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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~395~~ 110.

C. E. HOWARD, APPELLANT,

vs.

E. B. PERRIN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED OCTOBER 15, 1904.

(19,495.)

ing by reason of his suit, for the reason that the evidence introduced by plaintiff does not establish any title of the plaintiff to the premises in question and does not prove facts sufficient to establish a cause of action in favor of plaintiff and against defendant.

E. E. ELLINWOOD AND
W. C. CAMPBELL,
Attorneys for Defendant.

Filed: September 26th, 1901.
C. M. FUNSTON, *Clerk.*

18 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant. } Decree.

This cause having regularly come on to be heard this 26th day of September, A. D. 1901 upon the plaintiff's amended complaint and amended demurrer and answer to defendant's cross-complaint, and upon the defendant's amended answer and cross-complaint; and the evidence both oral and documentary introduced by the respective parties; and a jury having been duly empaneled and sworn, to whom were submitted interrogatories, and they having on September 26th, 1901, returned into court with their answers thereto; and it being found by said jury that the rental value of the land mentioned and described in plaintiff's complaint and hereinafter described was from the 2nd day of February, 1897 to the 2nd day of February, 1898, of the value of $240; and from the 2nd day of February, 1898, to the 2nd day of February, 1899, of the value of $140; from the 2nd day of February, 1899, to the 2nd day of February, 1900, was $100; and from the 2nd day of February, 1900, to the 2nd day of February, 1901, was $140; and from the 2nd day of February, 1901 to the 26th day of September, 1901, was $64.66.

19 And the court being fully advised in the premises makes the following:

Findings of Facts.

I.

That plaintiff is the owner of the hereinafter described tract of land, and that the said land was prior to the entry thereof — either the defendant and cross-plaintiff or his grantors, the property of the plaintiff and his grantors, and not public lands of the United States.

II.

That the improvements claimed by defendant and cross-plaintiff are all situate in and upon said tract of land.

III.

That the defendant and cross-plaintiff and his grantors have only used the water mentioned and described in defendant's cross-complaint, upon said land.

IV.

That the water thereon is not the water of a running stream with definite channel and banks.

Conclusions of Law.

Wherefore: The court finds that the plaintiff is the owner of and entitled to the immediate possession of, the said hereinafter described land, together with the improvements and water thereon, and that a writ of restitution should be issued out of this court in his favor for the possession thereof.

20 II.

That defendant and cross-plaintiff was a trespasser upon said land, and has no right to the improvements thereon.

III.

That neither the defendant and cross-plaintiff nor his grantors have ever made any valid appropriation of the water upon said land.

IV.

That plaintiff should have and recover from the defendant the sum of six hundred, eighty-four and 66/100 dollars, as the rental value of said land to and until the 26th day of September, 1901, together with interest thereon at the rate of seven per cent. per annum from said date.

Wherefore, it is ordered, adjudged and decreed:

First. That the plaintiff is the owner of and entitled to the immediate possession and exclusive possession, of that certain tract of land situated in the county of Coconino, Territory of Arizona, to wit: the northwest quarter of section fifteen, in township twenty-five north, of range three west, of the Gila and Salt River base and meridian, together with all and singular the water and improvements thereon; and that a writ of restitution should issue out of this court in his favor for the possession thereof, and that thereunder he be placed in the immediate possession thereof.

Second. That plaintiff have and recover from the defendant said

sum of six hundred, eighty-four and 66/100 dollaes, together
21 with interest thereon at the rate of seven per cent. per annum from the 26th day of September, A. D. 1901, and his costs herein taxed at $124.10; and that he have execution therefor.

Third. That defendant and cross plaintiff's cross-complaint and amended cross-complaint, be and the same is hereby dismissed.

Done by the court in open court, this 1st day of May, A. D. 1902.

RICHARD E. SLOAN, *Judge.*

Filed: May 1st, 1902, at 11 a. m.

C. M. FUNSTON, *Clerk.*

22 In the District Court of the Fourth Judicial District of Arizona in and for Coconino County.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant. } Motion for New Trial.

Comes now the defendant in the above entitled cause and moves the court to set aside the judgment herein and to grant new trial, and for grounds therefor says:

1. The court at the trial erred in admitting evidence over the objections of the defendant.
2. The court at the trial erred in rejecting evidence offered by the defendant.
3. The evidence at the trial does not sustain the judgment of the court.
4. The court erred in overruling the defendant's motion for judgment.
5. The court below erred in disallowing the value of improvements against the damages allowed the plaintiff.
6. The court at the trial erred in refusing to submit certain questions of fact asked to be submitted by the defendant.
7. The court at the trial erred in his charge to the jury.
23 8. The decision of the court is contrary to the law of the land.

Wherefore, defendant prays that the judgment of the court may be set aside and defendant granted a new trial of said action.

E. E. ELLINWOOD AND
W. C. CAMPBELL,
Attorneys for Defendant.

Filed: this 3rd day of May, 1902.

C. M. FUNSTON, *Clerk.*

24 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

Minute entries in the case of E. B. Perrin, plaintiff, *vs.* C. E. Howard. Filed July 13, 1898.

August Term, A. D. 1898.

TUESDAY, *August* 2, 1898.

Court reconvened after recess at 11 o'clock a. m.

Present: Hon. Richard E. Sloan, judge, E. S. Clark, district attorney, R. H. Cameron, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

This cause is hereby ordered set for hearing on Tuesday August 9, 1898.

MONDAY, *August* 8, 1898.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

By consent of both parties in action, and on motion of plaintiff's attorney, it is ordered that this cause be continued for the term.

April Term, A. D. 1899.

MONDAY, *April* 10, 1899.

Court convened at 9:30 o'clock a. m. for the regular April term, 1899.

Present: Hon. Richard E. Sloan, judge, presiding, James
25 Loy, district attorney, F. Fairchild, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

By consent of parties this cause is ordered continued for the term.

September Term, A. D. 1899.

MONDAY, *September* 18, 1899.

Court convened for the regular September term at 10 o'clock a. m. Monday, September 18, 1899.

Present: Hon. Richard E. Sloan, judge presiding, J. Loy, district attorney, J. A. Johnson, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

On motion and application of plaintiff, this case is hereby ordered continued for the term.

April Term, 1900.

MONDAY, *April* 9, 1900.

Court convened at 10 o'clock a. m. on Monday April 9, 1900, for the regular April term.

Present: Hon. Richard E. Sloan, judge presiding, Jas. Loy, district attorney, James A. Johnson, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

On motion of attorney for plaintiff this cause is hereby ordered continued for the term.

26 September Term, 1900.

Court convened at 10 o'clock a. m., Monday, September 17, 1900, for the regular September term, 1900.

Present: Hon. Richard E. Sloan, judge presiding, James Loy, district attorney, James A. Johnson, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

On motion of attorney for plaintiff this cause is hereby ordered continued for the term.

April Term, A. D. 1901.

MONDAY, *April 8th*, 1901.

This being the regular day of the April term of this court, being Monday April 8th, 1901. Court convened at 10 o'clock a. m.

Present: Hon. C. A. Keler, court commissioner, James A. Johnson, sheriff by R. J. Walker, deputy, J. E. Jones, district attorney, and C. M. Funston, clerk.

By order of the court commissioner court stands at recess until Monday, April 15, 1901 at 9:30 o'clock a. m.

Court reconvened after recess at 9:30 o'clock a. m. April 15, 1901.

Present: Hon. Richard E. Sloan, judge presiding, J. E. Jones, district attorney, J. A. Johnson, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

In this cause, on motion of the attorney for the defendant, and by consent of both parties to the action, it is ordered by the court continued for the term.

27 September Term, 1901.

TUESDAY, *September* 24, 1901.

Court convened after recess at 10 o'clock a. m. Monday, September 24, 1901.

Present: Richard E. Sloan, judge presiding, J. E. Jones, district attorney, J. A. Johnson, sheriff, and C. M. Funston, clerk.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

In this cause it is ordered that trial by jury be had on Thursday, September 26, 1901, at 9 o'clock a. m.

WEDNESDAY, *September* 25, 1901.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

This cause coming on for hearing on motion herein filed. Plaintiff's motion to strike out paragraph numbered IV of defendant's answer ordered sustained, and remainder of said motion over-ruled. To which ruling of the court the plaintiff then and there excepted.

THURSDAY, *September* 26, 1901.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

This cause having been heretofore set for hearing for this day, and the plaintiff being in court by his attorneys Edward M. Doe and Henry F. Ashurst, and the defendant being represented by E. E. Ellinwood. Both sides announcing as being ready the trial was
28 proceeded with. The following names were drawn, called and the persons sworn as to qualifications as to juror, being the full panel of twelve including the full number of challenges allowed by law: Wm. Rudd, C. M. Wolf, R. S. Edmundson, Al. Coverly, Wm. Kay, R. Gibson, Thos. A. Fleming, J. R. Twitty, Wm. Moatz, S. S. Acker, A. F. Roach, Earl Harrison, James Wallace, A. E. Douglass, L. F. Wilson, Frank Merritt, B. A. Doyle, H. F. Adams, W. H. Carroll. C. M. Wolf was ordered excused for cause and Dan. McDonald, called and sworn in his stead. W. H. Carroll was ordered excused for cause and James Andrews called and sworn in his stead.

The list was then handed first to the plaintiff, and then to the defendant that they might exercise their respective right to challenge.

The list was returned to the clerk with the following names remaining thereon, being the first twelve in their order thereon: Wm. Rudd, R. S. Edmundson, Wm. Kay, R. Gibson, J. R. Twitty, Wm. Moatz, S. S. Acker, Earl Harrison, A. E. Douglass, B. A. Doyle, H. F. Adams, Dan McDonald. The jurors were called and sworn to try the case. The cause was stated by the plaintiff to the court and jury. At request of the attorney for plaintiff the witnesses in this case were ordered placed under the rule, and the following witnesses were called, sworn: J. A. Lamport, Jeff. Evans, Adam Chuning, Judd Bishop, J. B. Girand, John Bishop, Jas. Stone, J. Kaufman, John Finlayson. The following witnesses were called, sworn and in turn testified for plaintiff: A. E. Macomber, Jeff Evans, —— Perrin.
29 Court being about to stand at recess the jury were duly admonished by the court and excused until 1:30 o'clock, p. m.

THURSDAY, *September* 26, 1901—1:30 o'clock p. m.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

The hearing of this case was resumed. On call by the clerk all the jurors answered to their names. Plaintiff rests.

Defendant now files and enters motion to dismiss case, which motion was by the court ordered denied, to which ruling defendant excepts.

The following witnesses were called in turn and testified in behalf of the defendant: J. A. Lamport, C. E. Howard, Adam Chuning, James L. Stone, Judd Bishop, J. Kaufman. The following witnesses, first being duly sworn, gave evidence in rebuttal: J. B. Girand, Wm. Loskridge, A. E. Macomber. Plaintiff rests. Defendant rests.

The cause was fully argued before the jury by respective counsel, first by E. M. Doe, for plaintiff, followed by E. E. Ellinwood for defendant. The jury was fully instructed by the court as to the law in the premises and as to the form of verdict. J. C. Mitchell was sworn as bailiff and the jury retired in his charge.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

The jury were returned into court by the bailiff, and upon call all answered to their names. Being asked if they had agreed on a verdict, through their foreman answered they had; being asked to declare it whereupon they declared the following verdict and the verdict was then read to the jury.

Question No. 1. Did the defendant grantor go upon the land, in question when it was unoccupied and unsurveyed?

Answer. Yes.

S. S. ACKER, *Foreman.*

The jury being asked if this was their verdict severally answered it was.

Question No. 2. Was the subterranean stream flowing in well defined channel upon said premises about the year 1889?

Answer. Yes.

S. S. ACKER, *Foreman.*

The jury being asked if this was their verdict severally, answered it was.

Question No. 3. Did defendant's grantor, about year 1889 or 1890 by means of sinking a shaft, and running tunnels therefrom intercept the flow of such underground stream of water?

Answer. Yes.

S. S. ACKER, *Foreman.*

The jury being asked if this was their verdict severally, answered it was.

Question No. 4. If you have found that there was an underground stream of water upon the premises in question, on or about the year 1889, did defendant's grantor divert the same and apply it to a beneficial use, to wit: for stock purposes?

Answer. Yes.

S. S. ACKER, *Foreman.*

III.

And further answering complaint of plaintiff, defendant alleges that he has constructed and erected upon said tract of land described in plaintiff's complaint, permanent and valuable improvements which defendant has so erected and constructed in good faith, that said improvements consist of a dwelling house, sheep and horse corrals, gardens, outhouses, pastures, fences, inclosures, water tanks, tunnels, reservoirs, dipping vats, troughs and watering places, all of which are of the value of five thousand, one hundred, twenty-three and 75/100 dollars ($5123.75). That for more than
6 three years prior to the beginning of this action, to wit: since the 8th day of June, 1892, the defendant has annually paid the taxes upon the improvements aforesaid.

Wherefore, defendant prays he may go hence without day, and for costs.

Cross Complaint.

I.

Comes now the defendant herein and cross-plaintiff and re-alleges all the matters and things admitted and alleged in the defendant's answer, save and except the allegations therein setting up the statute of limitations, and asks to have the same made a part of this cross complaint as fully and to the same extent as though the same were herein set out at length.

II.

And cross-plaintiff further alleges that there is a subterranean stream of water running in a well defined channel into, under, through and upon said premises described in plaintiff's complaint; that in the year 1889 and prior to any public survey of said land, one J. W. Abshire, cross-plaintiff's grantor, appropriated all of said water flowing in, under, through and upon said premises, and to that end, made cross-cuts, tunnels, wells and constructed pipe lines and reservoirs and conveyed said water to said reservoirs for irrigation, domestic, stock and
7 other beneficial purposes, and did all things necessary under the laws of the Territory of Arizona and of the United States to make a full and complete appropriation thereof; that thereafter, in the year 1892, the said J. W. Abshire, for a valuable consideration, sold, assigned and transferred and conveyed all his right, title and interest in and to the water and water-ways above set forth, to the cross-plaintiff herein, and on the 16th day of July, 1895, and prior to any public survey of said land the defendant and cross-plaintiff, to the end that he might make his right, title and interest to said water and water-ways definite and certain, under and by virtue of act # 86, of the 17th Legislative Assembly, of the Territory

of Arizona, appropriated all of said water both above and flowing under and upon said premises, and made certain cross-cuts, tunnels and wells and constructed pipe lines and reservoirs, and conveyed said water, so appropriated, to said reservoirs, for irrigation, domestic, stock and other beneficial purposes, and likewise did all things necessary, under the laws of the Territory of Arizona and of the United States, to make a full and complete appropriation thereof, and since said year 1889, the said J. W. Abshire, cross-plaintiff's grantor, and cross-plaintiff herein, have been in exclusive, open, continuous and adverse possession thereof, and have used said water and all thereof since said — 1889, for domestic, stock and other beneficial purposes; that to more clearly show said premises and
8 the course and direction of said stream flowing through said premises and the position of said cross-cuts, wells, pipe lines, reservoirs and water-ways, cross-plaintiff hereto attaches a plat of said premises marked "Exhibit A," and asks that same be made a part of this cross-complaint.

III.

That on said 16th day of July, 1895, this defendant and cross-plaintiff filed in the office of the county recorder, Coconino county, Arizona, a notice of water appropriation as above set forth, a copy of which is hereto annexed, marked "Exhibit B" and made a part of this complaint.

IV.

That the use of said land through and upon which said water and subterranean stream flows and is conducted, and the land upon which said cross-cuts, tunnels, wells, pipe lines and reservoirs is constructed, has been occupied and held by cross-plaintiff herein and his grantor, by open, peaceable, adverse and continuous possession since the year 1889, and the continuous use of said land, so held and occupied, as aforesaid, is necessary to the cross-plaintiff for the maintenance and complete use and benefit of the water and water-ways appropriated and used by him, as herein before set forth, and for the full and complete enjoyment of said water and water-ways it is made necessary for defendant and cross-plaintiff to go in and upon said land from time to time, for the purpose of repairing said cross-cuts, tunnels, wells, pipe lines, reservoirs and subterranean stream.

9 V.

Wherefore, defendant and cross-plaintiff prays judgment:

(1.) That it may be decreed that cross-plaintiff is the owner by right of appropriation of all the water flowing into and through said subterranean stream or channel, as hereinbefore set forth, and that he is entitled to the exclusive use and benefit thereof.

(2.) That it be decreed that defendant and cross-plaintiff shall have a right of way over, through, in and upon said premises, for

the purpose of maintaining and continuing the use of the water appropriated, as aforesaid, and shall have a license to go in and upon said premises, for the purpose of repairing said cross-cuts, tunnels, wells, pipe lines and reservoirs at any and all reasonable times.

(3.) That the plaintiff and cross-defendant be enjoined from in any manner interfering with defendant's and cross-plaintiff's right to said water and water-ways, and said right to enter in and upon said premises for said purposes as aforesaid.

(4.) For general relief and costs of suit.

E. E. ELLINWOOD &
W. C. CAMPBELL,
Attorneys for Defendant and Cross-plaintiff.

10 TERRITORY OF ARIZONA, } ss.:
County of Coconino, }

C. E. Howard, being duly sworn, deposes and says: He is the defendant and cross-plaintiff in the above entitled action; that he has read the foregoing cross-complaint and knows the contents thereof, and that the same is true of his own knowledge, save and except such matters as therein stated upon information and belief, and as to such matters he believes them to be true.

C. E. HOWARD.

Subscribed and sworn to before me this 25th day of September, 1901.

[SEAL.] C. M. FUNSTON,
Clerk District Court.

"EXHIBIT B."

Copy.

Notice of Water Appropriation.

Notice is hereby given that in accordance with act No. 86, of the 17th legislature of the Territory of Arizona, I, C. E. Howard, of Coconino county, Arizona, have appropriated for irrigation, domestic, stock and other beneficial purposes, all the water hereinafter described. To that end I have made certain cross-cuts, tunnels and a well, in a certain, defined underground channel of water, thus making a flowing well and spring; also a certain ditch, pipe
11 line and reservoir; all located at the place known as the Abshire place, held by me as a possessory right, about 35 miles northeast of Ash Fork, Arizona, on unsurveyed land of the United States, said cross-cuts, tunnels and well, are located about 10

feet from the dwelling house on said place; said ditch and pipe line running from said cross-cuts, cunnels and well a distance of about 200 yards easterly to the said reservoir.

My appropriation covers all the water which now flows or may hereafter flow, in the above described underground channel, and all the surface, surplus or flood waters that flow in the ar-oya or wash above the said underground channel.

This notice is posted on the dwelling house at the place above described, about 10 feet from the cross-cuts, tunnels and well there located.

Dated this 16th day of July, A. D. 1895.

C. E. HOWARD.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

Before me, C. H. Coble, a notary public in and for the county and Territory aforesaid, appeared C. E. Howard, known to me to be the person whose name is affixed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes therein expressed.

Given under my hand and seal of office this 16th day of July, A. D. 1895.

[SEAL.]

C. H. COBLE,
Notary Public.

12 Recorded: July 16th, A. D. 1895, at 5:20 p. m.

C. A. BUCH,
County Recorder,
By W. M. MILLER, *Deputy.*

13 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant. } Plaintiff's Amended Demurrer and Answer to Defendant's Cross-complaint.

General Demurrer.

Comes now the above named plaintiff and demurs to the defendant's third defence herein and for ground of demurrer says that the same does not state facts sufficient to constitute a defence herein.

Wherefore, plaintiff prays judgment as to the sufficiency of the said third defence.

HENRY F. ASHURST,
EDWIN M. DOE.
Attorneys for Plaintiff.

Answer to Cross-complaint.

Comes now the above named plaintiff and answering the defendant's cross-complaint on file herein, for a first defence; demurs to defendant's cross-complaint and for ground of demurrer says that two separate and independent causes of action are therein improperly united,

Wherefore, plaintiff prays judgment as to the sufficiency of
14 said cross-complaint.

For a second defence.

Plaintiff demurs to the defendant's cross-complaint and for ground of demurrer says that the same does not state facts sufficient to constitute a cause of action.

Wherefore plaintiff prays judgment as to the sufficiency of said cross-complaint.

HENRY F. ASHURST,
EDWIN M. DOE,
Attorneys for Plaintiff.

For a third defence.

Further answering defendant's cross-complaint herein, plaintiff admits:

I.

The residence of the parties to be as alleged.

II.

Plaintiff admits that defendant filed in the office of the county recorder of Coconino county, Arizona, the copy of the notice attached to defendant's amended answer and cross-complaint herein marked "Exhibit B" on the date therein alleged.

III.

Plaintiff admits that defendant has been in possession of the premises mentioned in said cross-complaint since the second day of February, A. D. 1897; but plaintiff has no information or knowledge of what further time defendant has been in possession thereof and therefore denies that defendant was in possession thereof prior to said date.

15 IV.

Plaintiff denies each and every, all and singular, the allegations, matters and things in said cross-complaint contained save and except such as have been hereinbefore expressly admitted.

V.

Plaintiff alleges that ever since the 31st day of December, A. D. 1872, and until the 13th day of January, 1897, the Atlantic & Pacific Railroad Company was at all times the owner of and entitled to the immediate and exclusive possession of all and singular the premises mentioned in defendant's cross-complaint. That on said 13th day of January, A. D. 1897, and at all times since, the plaintiff has been the owner of and entitled to the immediate and exclusive possession of said premises by reason of purchase from the said Atlantic & Pacific Railroad Company and under and by virtue of a good and sufficient conveyance, to wit: a warranty deed from the said Atlantic & Pacific Railroad Company to the said plaintiff for said premises togather with other real property, made, executed and delivered on the said 13th day of January, A. D. 1897.

Wherefore, plaintiff prays judgment that defendant's cross-complaint be dismissed and that he recover nothing thereunder or by virtue thereof, and for costs of suit.

HENRY F. ASHURST,
EDWIN M. DOE,
Attorneys for Plaintiff.

16 TERRITORY OF ARIZONA, } *ss:*
County of Coconino, }

Henry F. Ashurst first having been duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above entitled cause and he makes this affidavit on behalf of the plaintiff herein because he is absent and inaccessible. That he has read the foregoing answer and knows the contents thereof to be true of his own knowledge except as to the matters therein admitted and those denied on information and belief, and as to those matters he verily believes it to be true.

HENRY F. ASHURST.

Subscribed and sworn to before me this 25th day of September 1901.

C. M. FUNSTON,
Clerk District Court.

Filed: September 25th, 1901.
C. M. FUNSTON, *Clerk.*

17 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant.

Now, on the conclusion of the plaintiff's testimony, the defendant moves the court for judgment in his favor that plaintiff take noth-

approved July 27th, 1866. That said land lies within the limits of forty miles of the line of route of the Atlantic and Pacific railroad.

That prior to the year 1884 the construction of said railroad was completed through the Territory of Arizona from its eastern to its western boundary and had been accepted by the President of the United States. That said land was selected and the filing thereof was allowed and approved by the register and receiver of the United States land office at Prescott, Arizona, on the 28th day of June, A. D. 1896.

Second.

That on the 22nd day of November, 1866, the board of directors of the Atlantic and Pacific Railroad Company, duly, regularly and legally by resolution of its board of directors, passed a resolu-
39 tion accepting the terms, conditions and impositions of the said hereinbefore mentioned act, and on the 23rd day of November, 1866, said resolution was by the president and secretary of said company, being thereto lawfully authorized and empowered, forwarded to the Secretary of the Interior, of the United States of America, and in due course of mail by him received, filed and approved.

Third.

On the 27th day of June, A. D. 1896, the said Atlantic and Pacific Railroad Company had paid the cost of said survey as required by law, and on said day paid to said register and receiver of said United States land office at Prescott, Arizona, all fees, costs and charges allowed them by the law. That the maps and plats in the U. S. land office on file at Prescott, Arizona, do not show the said premises to be within the limits of any reservation.

Fourth.

That a map of the definite location of the said Atlantic and Pacific railroad through and across the Territory of Arizona was in the year 1872 filed with the Secretary of the Interior and the Commissioner of the General Land Office and by each of said officers accepted and approved according to law in said year.

It is expressly understood, however, that nothing contained in this stipulation shall prevent either party hereto from introducing any evidence otherwise competent and admissible other than contradictory of the facts herein stipulated."

40 (Signed) HENRY F. ASHURST,
EDWARD M. DOE,
Attorneys for Plaintiff.
E. E. ELLINWOOD,
W. C. CAMPBELL,
Attorneys for Defendant.

It is orally stipulated by respective counsel in open court that the act of Congress approved July 27th, 1866, and entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean" shall be deemed and taken as duly and regularly offered and received in evidence as the same appears in the United States Statutes at Large.

E. S. CLARK, a witness called and sworn on behalf of plaintiff, testified as follows:

By Mr. DOE:

Q. Mr. Clark, will you examine this map and state what it is?
A. That is a map of the Territory of Arizona taken from the official report of Governor Murphy of the Territory of Arizona, made to the Secretary of the Interior for the year 1900; it was published by authority of Congress.

By Mr. DOE: I now offer that in evidence.
By Mr. ELLINWOOD: We object to the introduction of the map on the ground that it is incompetent, irrelevant and immaterial and not the best evidence until shown to be an official map.
By the COURT: Well, let it go in, to which ruling of the court the defendant then and there excepted, and the map was duly
41 put in evidence and exhibited to the court and jury.

By Mr. DOE: I now offer in evidence a certified copy under the seal of the Commissioner of the Land Office of the record pertaining to the selection of these lands by the Atlantic and Pacific Railroad Company, which offer is marked Plaintiff's "Exhibit B" and was in words and figures as follows:

"EXHIBIT B."

(4–207a.)

F.
C. S. B.

DEPARTMENT OF THE INTERIOR, S. S. A.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 21, 1901.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy so far as pertains to township 25 north ranges 3 and 4 west, Arizona, of a list filed in the local land office at Prescott, Arizona, June 30, 1896, is a true and literal exemplification from the original list now on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

BINGER HERMANN,
Commissioner of General Land Office.

42 *List of Lands in the Land District Selected by Atlantic and Pacific Railroad Company.*

The undersigned, the duly authorized general agent of the land department of the Atlantic and Pacific Railroad Company, under and by virtue of the acts of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866," and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, and contained in a circular dated January 24th, 1867, hereby makes and files the following list of selections of public lands claimed by the said Atlantic and Pacific Railroad Company as enu-ing to it and to which it is entitled, under and by virtue of the grant and provisions of the said acts of Congress, and the location of the line of route of said railroad and telegraph line of said Atlantic and Pacific Railroad Company, being for a section of one hundred miles of said road: Commencing at a point near the town of Isleta, in the county of Bernalillo, Territory of Mexico, coterminous with the 14, 15, 16, 17 and 18 sections of said road, which said section of road and telegraph line has been duly accepted by the President of the United States, as provided in the aforesaid acts of Congress.

C. H. FANCHER,
General Agent of the Land Department.

43 The selections being particularly described as follows:

A. M. S. 4–298.

North of base line and west of Gila and Salt River principal meridian.

Atlantic & Pacific Railroad List of Selections Made at United States Land Office at Prescott, Arizona.

No.	Parts of sec.	Section.	Township.	Range.	Acres.	Remarks.
* *	* * *	* * *	* * *			
	All of.....	15	25	3	640.00	

(Further description of other lands selected is here omitted by consent of counsel as being immaterial to the issues in said cause.)

CHICAGO, *Nov.* 6, 1894.

Hon. C. N. Sterry, gen. att'y A. & P. R. R., Albuquerque, N. M.

DEAR SIR: The land commissioner of the Atlantic & Pacific Railroad Company has resigned, and his resignation has been accepted.

Under existing circumstances, the receivers deem it inexpedient to definitely fill the vacancy at present. They therefore re-
44 quest you to take charge of the office temporarily under the title of acting land commissioner. The books and papers are being moved to Albuquerque.

Very truly yours,

ALDACE F. WALKER,
JOHN J. McCOOK,
J. C. WILSON, *Receivers.*

I hereby certify that the foregoing is a true and literal copy of the original.

KARL A. SNYDER,
Notary Public.

My commission expires Nov. 26, 1898.

Atlantic & Pacific railroad.

C. W. Smith, receiver; C. H. Fancher, general agent; C. N. Sterry, acting land commissioner.

Land department.

June 26, 1896.

ALBUQUERQUE, N. M., *June* 26, 1896.

Mr. C. H. Fancher, general agent, land dep't, A. & P. R. R. Co., Albuquerque, N. M.

DEAR SIR: You are hereby authorized to file with the register and receiver of the U. S. land office, at Prescott, Arizona,
45 list of selections of lands No. 16 for lands within the grant limits to this company, in Arizona.

C. N. STERRY,
Acting Land Commissioner A. & P. R. R. Co.

TERRITORY OF NEW MEXICO, } ss:
County of Bernardino, }

I, C. H. Fancher, being duly sworn, depose and say that I am the general agent of the land department of the Atlantic and Pacific Railroad Company. That the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Atlantic and Pacific Railroad Company, for which a grant of land was made by the acts of Congress, entitled "An act granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean, approved July 27th, 1866." That the said lands are vacant, unappropriated and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant, lying within the limits of forty miles on each side of the line of route of said road,

being for a section of one hundred miles of said road: Commencing at a point near the town of Isleta, in the county of Bernalillo, Territory of New Mexico, coterminous with the 14, 15, 16, 17 and 18 sections of said road, which said section of road and telegraph line has been duly accepted by the President of the United States,
46 as provided in the aforesaid acts of Congress.

C. H. FANCHER.

Subscribed and sworn to before me this twenty-seventh day of June, A. D. 1896.

KARL A. SNYDER,
[SEAL.] *Notary Public.*

We hereby certify that we have carefully and critically examined the foregoing list of the lands claimed by the Atlantic and Pacific Railroad Company, under the grant to said Atlantic and Pacific Railroad Company by the acts of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean, approved July 27th, 1866" and selected by C. H. Fancher, the duly authorized general agent of the land department of the said Atlantic and Pacific Railroad Company; and we have tested the accuracy of said list by the plats and records in this office, and we find the same to be correct; and we further certify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the forty miles of granted limits on each side, and that the same are not nor is any part thereof, returned and d-ominated as mineral lands or land, nor claimed as swamp land, neither are there any homesteads, preemptions, State, nor other valid claim to any portion of said lands on file or record in this office. We further certify that
47 the foregoing list shows as assessment of the fees payable to us, allowed by the act of Congress, "Approved July 1st, 1864," and contemplated by the instructions dated January 24th, 1867, and addressed by the Commissioners of the General Land Office to the registers and receivers of United States land offices, and that the said Atlantic and Pacific Railroad Company has paid to the undersigned, the receiver, the full sum of one thousand, three hundred and forty ($1340) dollars, in full payment and discharge of said fees.

H. D. ROSS,
Register of the United States Land Of.
JAKE MARKS,
Receiver of the United States Land Office.

Noted in selection docket page 10.

To which offer defendant then and there objected on the ground that the same was incompetent, irrelevant and immaterial and not the best evidence; that the purported correspondence attached to

said "exhibit" and certified to by the Commissioner is not made evidence by virtue of the certificate of the Secretary of the Interior or any subordinate official; that which would not be evidence in the first place before the letters were heard cannot be made evidence by the certificate. It is not a sworn statement of any person, which objection was by the court overruled and to the ruling of the
48 court the defendant then and there excepted, and said Plaintiff's "Exhibit B" was then exhibited and read in evidence to the court and jury.

A. E. MaComber, a witness on behalf of the plaintiff, was then called, sworn and testified as follows: I live at Williams, Arizona, and have lived in this county since 1888 most of the time; I am a timber estimator and explorer; I have had a great deal of experience in selling land extensively in this county; I have bought and sold good many; I am somewhat familiar with the rental value of lands in this country; I know the northwest ¼ of section 15, township 25 north of range 3 west, Gila and Salt River meridian; I have been on that tract; there is some scrubby timber, not a great amount of commercial timber; there is a spring on the northeast ¼ of that ¼ section, known as Howard's spring, and there is some improvements, some fences, some cultivation.

By Mr. Doe:

Q. What in your judgment would be the rental value of the land for a year from the second day of January, 1897 to date?

By Mr. Ellinwood: I object for the reason that the witness has not qualified himself to pass upon that question.

By the Court: You may examine him upon that question.

By Mr. Ellinwood: Mr. MaComber, are you familiar with the renting of premises in that vicinity?

A. Well, I don't know of other lands being rented there.

Q. Have you any knowledge of any lands being rented in that vicinity?

A. No, I have not.

Q. Upon what do you base your knowledge?

A. Well, I should base my knowledge of its rental value
49 upon the surrounding conditions there; now if there were numerous springs numerous watering places, why I should say that it would be—that it would not have much of any value; if that was the only spring in a very good grazing country then I should attach a considerable value to the rental. I should not make any comparison with other places in that vicinity; I should form my conclusions from the fact that there is little water I understand, although I have never seen that other place, that would make this particular tract quite valuable, although I am not very competent to make an estimate; I have never been engaged in the sheep or cattle

business; I do not know of any land in that vicinity that could be rented unless connected with this place; I have never rented places myself, I have heard of them being rented; I have heard of the A1 water being rented; that is a long way from there and contains over a hundred thousand acres of land; I don't know what they paid for it; the only place I know of being rented is the A1 tract. I know nothing of the rental value other than report. The water on the A1 tract is worth something; I would not base my conclusions on that wholly; I base my conclusions on the conditions if that is a desert country over there with no grass I would say the rental value would be practically nothing; if it is a good grazing country that you have got different conditions. I am unable to recall any particular prices that any man ever paid for a ranch anywhere as rental value. Yes, there has been one place in Springerville, another dry country; I know it has been fenced by lesse-s of my
50 own knowledge; I don't know what they paid for it; I don't know that.

By the COURT: Mr. MaComber, in estimating the rental value of this tract of land for what purpose or uses could it be put to to make it of any value?

A. Well, the value I would attach would be for stock purposes; that is for cattle, horses and sheep; that is for—the only value I should——.

By the COURT:

Q. But then you may put a tract of land in this country to more than one use in connection with stock growing. What would give it rental value? The pasturage or water?

A. The pasturage around that country the fact of it being practically the only water there except a little spring I understand is on the adjoining section that I never seen that I recollect of any, as I say to take all the conditions into consideration and the fact of that being practically all the water in that grass country and being away from other places and the annoyance of other people would give it a rental value, I should think, although I would admit that I would be a poor witness never being engaged in the stock business my judgment and estimate might be a very poor one.

By Mr. DOE: Is it not a fact that you have handled a great many tracts of land in this country?

A. Yes, a good many.

By the COURT: Well, now, Mr. MaComber, do you feel confident to give an estimate based upon your knowledge of this tract of land and the conditions that surround it as to its rental value?

A. I should give an estimate of what I know I could rent it for if I owned it, Judge. If I were to make the estimate.

51 By the COURT: Well, your estimate may go to the jury.

By Mr. ELLINWOOD: In estimating the rental value are you

estimating the rental value of this 160 acres of land or of the land surrounding that country for 10 miles?

A. Well, I should estimate the only way I could estimate is if I owned it what could I get it for.

Q. I mean the 160 acres of land, are you confining the price you are to get for the 160 acres of land?

A. No. The land would not have any value, the land without the water would not have much value; to rent the water—the value would be in the water principally. The little tract of agricultural land there ain't enough to cut much figure.

By the COURT: I don't think you understand the question. In estimating your value do you take into consideration the value of the use and occupation of the surrounding land for grazing or do you restrict your estimate to the value of the 160 acres in question here, rental value.

A. Well, in the absence of other lands—the use of other lands, that would not have much value. I could give you an estimate of what I think I could rent it for myself; I am taking in consideration that the surrounding country is a grass country; that is the basis of my estimate, to utilize it with the other region. I would give a small price for the 160 acres with the water if it were not there; I am taking in consideration the surrounding country if it were all owned by an outfit and they were to deny the right of water I would not attach much value to this—the alternate sections.

By the COURT: Give the estimate.

52 By Mr. ELLINWOOD: I object to the qualifications of the witness and further that the basis of the estimate is that of the surrounding country and not the land itself; it contemplates rental value for miles around.

Which objection was over-ruled by the court; to which ruling of the court the defendant then and there duly excepted.

A. I should think I could lease the ground for—well, I would have to leave a margin on that; I guess from three hundred to six hundred a year.

By Mr. DOE: Now, Mr. MaComber, do you mean at present or do you mean that that would be its rental value from the 2nd of February, 1897, up to date? taking into consideration the seasons.

A. I think so; I think I could have leased it; well, no, I won't go back so far, Mr. Doe, as 1897, but would take from '82 from the time the boom in cattle up to the present; that would be my estimate for the last four years; that would be my estimate for the last ten years; from three to six hundred.

Cross-examination.

By Mr. ELLINWOOD:

I have been on the place two or three times, in that region; I have never explored that place but once; I went there at the re-

quest of the plaintiff in this action; not particularly for the purpose of testifying in that case; they sent me over there to identify the location; I think they paid me. I was here in 1897 in this county; '97, '98 and '99 I was here in this county and in 1900. I have never explored the particular tract in question but once, they wanted to identify it to know what section it was in; I think
53 it was three years ago; there was not a great amount of water running from that stream at that time; I think the water was piped away; I think an inch and a half pipe and that was not filled; I do not know how much water was flowing in '97: I was at the place in '98; I only know what amount of water was flowing at that time. Yes, I am testifying to the rental value for a period of five years; I do not know whether the stream was dried up. I have known the spring ever since I have been in the county by reputation.

Q. You are willing to testify to what it was worth year after year for five years when you have never seen the place but once?

A. No, I have never seen it but once to examine it.

Q. Now, Mr. MaComber, supposing I owned that tract of land of 160 acres and owned this subterranean stream and reservoir upon the land and had it enclosed and you were excluded from the use of the country surrounding, would you give three hundred dollars a year for the water and the 160 acres enclosed?

A. No.

Q. What would it be worth enclosed and you being prevented from using the surrounding country, the water and the 160 acres of land?

By Mr. DOE: I object to the proposition.

By the COURT: Yes, I think it is not before the court.

By Mr. ELLINWOOD: He is renting the railroad lands surrounding the place.

By the COURT: No, I don't think so.

By Mr. ELLINWOOD: It has not appeared what the surroundings are as far as that is concerned.

By the COURT: O, yes, he has stated. I think that's a fair way to estimate it.

By Mr. ELLINWOOD: Mr. MaComber, if it is proven to be a fact that the range had been eaten off and was not valuable
54 surrounding this place, would you still maintain your figures of three to six hundred dollars?

A. No, I would not; if that was a desert country or eaten out without grass it would not rent for that; it would possibly rent for nothing, nor would my figures be maintained if during this period of time the spring should be practically dried up; if no water was there it would be worth nothing. Under the conditions as I saw them I should think 6000 head of sheep could water there; I took this into consideration; possibly I might be in error; it might be

15000 head; it looked to me like it would water the sheep that could cover the grass for a good many miles; by watering them every two or three days sheep could be moved probably ten or twelve miles from the spring in most any season. Some seasons they could let them go for three or four days and others it would be necessary to water every two days possibly.

Q. Well, Mr. MaComber, what in your estimate would be the value of the water without the land?

By Mr. DOE: I object.

By Mr. ELLINWOOD: The rental value for a year?

By Mr. DOE: The question is immaterial and irrelevant; it is perfectly obvious that water without the land could not be of use to anybody; if they could not have the use of the land they could not use the water.

By the COURT: He has already answered that question; he says the land would not be worth anything without the water.

By Mr. ELLINWOOD: And the water without the land?

A. No, sir.

By Mr. ELLINWOOD: I move to strike out the testimony of Mr. MaComber's on the ground that it is incompetent, irrelevant
55 and immaterial and that he has not shown himself competent to testify as an expert witness, which motion was by the court over-ruled; to which ruling of the court the defendant then and there duly excepted.

JEFF EVANS, a witness called on behalf of the plaintiff, was sworn and testified as follows: I live at Williams; I have lived there about ten years; I have been in the sheep business; I know where the Abshire and Bishop spring is, but I don't know what section it is in or township; it is the spring that has been in Howard's possession for three years; they call it 40 miles northwest of Williams; I know where the place is that Howard owns out there; he occupies but one place there. Well, there are two springs there, but a mile apart; he owns them both. The place that is occupied by him has improvements upon it consisting of a dwelling house, cellar, pasture, sheep and cattle corral, and there is a spring on that quarter section; there is a well dug down I suppose twelve or fifteen feet; they call it a spring. There is fencing on the place. I have been acquainted with the place since 1895; I used to work for Mr. Howard and was at the ranch a good many times while I was at work for him. I am acquainted with the tract; I cannot approximate the amount of water that has been there since the 2nd of February this year; I have not been on it; I worked for Mr. Howard during 1895, '96, '97, '98 and '99. I do not know the full amount of sheep and horses he watered on this place during those years; sometimes he had more than others; in wet
56 seasons he had more than in dry seasons; I don't remember what he had in 1897; when he had plenty of water there he

The jury being asked if this was their verdict severally, answered it was.

31 Question No. 5. If you have found that there was a subterranean stream upon the premises in question, was defendant's grantor the first person to divert and apply such water to a beneficial use?

Answer. Yes.

S. S. ACKER, *Foreman.*

The jury being asked if this was their verdict severally, answered it was.

Question No. 6. If you have found that there was a subterranean stream of water upon said premises, did defendant's grantor intercept the same by means of a shaft and tunnel and convey the same by means of a pipe line to water troughs and reservoir?

Answer. Yes.

S. S. ACKER, *Foreman.*

The jury being asked by the court if this was their verdict severally, answered it was.

Question No. 7. Has the defendant and his grantor from about the year 1889 down to the time of bringing this suit, been in the open, notorious, uninterrupted, and peaceable possession, with the knowledge of the plaintiff, of the land and the shaft and tunnel and pipe leading therefrom and reservoir connected therewith and using water flowing therefrom for stock purposes?

Answer. Yes.

S. S. ACKER, *Foreman.*

The jury being asked by the court if this was their verdict severally, answered it was.

Question No. 8. Had the premises in question any annual rental value since February 2nd, 1897?

Answer. Yes.

S. S. ACKERS, *Foreman.*

32 The jury being asked by the court if this was their verdict severally, answered it was.

Question No. 9. If in the answer to the last question you have found that the premises in question did have a rental value, state what rental value, state what such rental value was year by year, since February 2nd, 1897?

Answer:

February	2,	1897	to	Feb.	2, 1898	$240.00
"	"	1898	to	"	" 1899	140.00
"	"	1899	to	"	" 1900	140.00
"	"	1900	to	"	" 1901	100.00
"	"	1901	to	Sep.	26, 1901	64.66

S. S. ACKER, *Foreman.*

The jury being asked by the court if this was their verdict severally, answered it was.

The verdict was then recorded by the clerk in open court in the presence of the jury, and the jury was, by the court, ordered discharged from the case.

SATURDAY, *September* 28, 1901.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

In this case it was ordered that the respective parties have thirty days in which to file briefs with this court.

April Term, A. D. 1902.

MONDAY, *April* 28, 1902.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

In this cause a motion for new trial was made by defendant.

33 April Term.

SATURDAY, *May* 3, 1902.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

This cause coming up on motion for new trial filed herein by defendant the cause is ordered continued till Thursday June 12, 1902.

April Term, A. D. 1902.

THURSDAY, *June 12th*, 1902.

E. B. PERRIN
vs.
C. E. HOWARD. } No. 394.

This cause coming on for hearing upon the motion for a new trial heretofore submitted, the court now over-ruled said motion whereupon defendant by his attorney gave notice in open court that defendant appeals from the finding and decree of said court and the order over-ruling said motion for a new trial to the supreme court of the Territory of Arizona.

The April term, A. D. 1902, of said court was then adjourned *sine die*.

Each day's minutes as shown by the foregoing are signed as follows:

RICHARD E. SLOAN, *Judge.*

Attest: C. M. FUNSTON, *Clerk.*

34 TERRITORY OF ARIZONA, } ss:
County of Coconino, }

I, C. M. Funston, clerk of the district court of the fourth judicial district of the Territory of Arizona, in and for the county of Coconino, the same being a court of record having a clerk and a seal, and having common law jurisdiction, do hereby certify *that* the above and foregoing to be a true and correct copy of the minute entries, of the court docket in the case wherein E. B. Perrin is plaintiff and C. E. Howard, defendant, that it — the — thereof, and that the same is now of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Flagstaff this the 2nd day of September, 1902.

C. M. FUNSTON,
Clerk District Court.

[SEAL.]

35 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant. } Bill of Exceptions (Containing All the Evidence).

Filed this 12th day of June, 1902, at 10 o'clock a. m.
C. M. FUNSTON, *Clerk.*
——— ———, *Deputy.*

36 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant. } Bill of Exceptions (Containing All the Evidence).

Be it remembered that at the regular September 1901 term of the above named court, began and held at Flagstaff, Coconino county, Arizona Territory, on the 26th day of September, 1901, thereafter continuing from day to day and from time to time until the 26th day of September, 1901, on which last mentioned day this cause came on regularly to be heard before the court and a jury upon the

issues joined as set forth in plaintiff's complaint, defendant's amended answer and plaintiff's amended answer to defendant's cross complaint, and was tried on the 26th day of September, 1901, during the trial of which cause the following exceptions were saved to alleged error in the trial of said cause.

Attorneys for plaintiff then read in evidence the stipulations on file in said cause which was in words as follows:

By Mr. DOE: This is an action, gentlemen, brought by E. B. Perrin, plaintiff, against C. E. Howard, under the statute of trial right
37 of property, real property, for the possession of a certain 160 acres of land in this county upon which it is alleged there is valuable water, and damages in the nature of rental profits for the use of the land since the second day of February, 1897.

By Mr. ELLINWOOD: May it please the court, I don't see how it is material to read that stipulation to the jury.

By the COURT: Well, the difficulty is the court is in ignorance as to what the issues will be.

By Mr. ELLINWOOD: We certainly won't submit any that we have stipulated to.

By the COURT: It can't harm anybody to read it.

(Stipulation read as follows:) "It is hereby stipulated and agreed by and between the respective parties hereto that for the sake of brevity and for the saving of time and expense in the trial of the above entitled cause, in the above entitled court, and in the hearing thereof in any appellate court, the following matters and things shall be deemed and taken as true and of the same force and effect as though fully and legally proven upon the trial of said cause, viz:—

The following described tract of land, to wit: the northwest quarter (¼) of section fifteen (15) township twenty-five (25) north of range three (3) west, of Gila and Salt River meridian, is in the county of Coconino, Territory of Arizona, That it was surveyed under the authority and direction of the surveyor general of the United States in the months of April, June and July, A. D. 1894. Said survey was duly, regularly and legally accepted and approved by the United States surveyor general, on the 13th day of July,
38 A. D. 1895, duly and regularly accepted and approved by the Commissioner of the General Land Office of the United States of America, and triplicate plats of the land embraced in said survey by him ordered filed in the local land office. That said plats were so filed; and thereafter and on the 27th day of June, 1896, said land was duly, regularly and legally listed and selected by the Atlantic and Pacific Railroad Company as a portion of the lands claimed by it as being a portion of the public lands for which a grant of lands was made by the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the State- of Missouri and Arkansas to the Pacific ocean"

made prior to the execution of such deed by the receivers to and with Edward B. Perrin, pursuant to an order made in each of said courts of which the following is a copy, except that it is a copy of the order made in the district court of the second judicial district of the Territory of New Mexico, and the orders made in Arizona and California were entered in their respective courts there and were entitled therein and dated subsequently:

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY, Defendant. } In Equity.

Now, on this 20th day of April, 1894, the petition of said receivers being presented to me for authority to lease and sell lands granted by the United States to said Atlantic and Pacific Railroad Company to aid in the construction of said railroad, and certain lands and lots at The Needles, California, and the said petition having been duly considered, together with the answer of the Mercantile Trust Company thereto, it is hereby

Considered, ordered and adjudged, that the said receivers are authorized to lease and sell said lands and lots from time
68 to time as opportunity offers, when a fair and reasonable price can be secured for the same, and that out of the proceeds of said leases and sales, the expenses of conducting the same and transacting the land and lot business, and protecting the title of said lands and lots, shall be paid, and the balance shall be disposed of as the court shall order in the future. But no final disposition of said proceeds shall be made until after hearing by the court upon due notice to all of the parties hereto.

N. C. COLLIER, *Judge.*

And said deed was made by the Atlantic and Pacific Railroad Company pursuant to the further order made by the district court of the second judicial district of the Territory of New Mexico, of which the following is a copy:

"In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY and The United States Trust Company of New York, Defendant-. } In Equity. No. 999.

And now on this 18th day of July, A. D. 1895, the receivers hereinbefore appointed in the above entitled cause having here-
69 tofore presented to me their application on and petition asking that an order be made by the court authorizing, allow-

ing and permitting the Atlantic & Pacific Railroad Company to execute through its proper officers such deeds and proper conveyances as it may or can make for any and all sales or contracts of sales of lands or standing timber, or interests in lands belonging to the Atlantic & Pacific Railroad Company which the receivers have heretofore, or may hereafter sell, or make contracts of sale for upon the requests of such receivers.

It being made to appear that notice of said application was duly and legally served upon The Mercantile Trust Company of New York, complainant, and upon the defendant, The United States Trust Company of New York, and upon the defendant, The Atlantic — Pacific Railroad Company, and it further appearing that the plaintiff and the defendant United States Trust Company of New York, have agreed in writing that said application may be made to this court at any time, and the defendant The Atlantic & Pacific Railroad Company appearing by its solicitor, Karl A. Snyder, and the receivers by their solicitor, C. N. Sterry, and The Mercantile Trust Company of New York by its solicitor, W. B. Childers, said application was by the court taken up and considered, and upon consideration thereof:

It is ordered that the defendant Atlantic and Pacific Railroad Company may upon the request of the receivers, or a majority of them, make any and all such deeds or proper conveyances of lands owned by the Atlantic and Pacific Railroad Company as may heretofore have been sold by either the receivers or the Atlantic
70 & Pacific Railroad Company, or which may hereafter be sold by the receivers of the property of the Atlantic & Pacific Railroad Company, and may also at the request of the receivers sell and convey or lease any and all interests which it may have in any lands belonging to it which the receivers have heretofore or may hereafter agree to sell and convey to any purchaser or any proper party to carry out any contracts made by the receivers, or heretofore made by the Atlantic and Pacific Railroad Company, or which the receivers may hereafter at any time make for the benefit of the property in their hands as such receivers; that the Atlantic and Pacific Railroad Company may make and execute any and all proper bills of sale, contracts, or deeds or other proper conveyances of any timber upon the lands of the Atlantic and Pacific Railroad Company which the receivers have heretofore or may hereafter sell, or agree to sell.

It is ordered that the requests and consents of the receivers to the conveyances, contracts, bills of sale and other instruments in writing hereinbefore authorized to be made, shall be evidenced by the endorsement upon such instrument or instruments by the receivers, or a majority of them, of their consent and approval to the making of such instrument or instruments, and that upon the execution by the Atlantic & Pacific Railroad Company of any such instrument as is herein before provided for and the approval of the receivers

endorsed thereon as herein provided for, the same shall be
71 and become effective to convey the interest of the company and of the receivers in any and all such real estate or interests in real estate of any nature, kind or description which the railroad company owns and which is in the custody and possession of the receivers as the same may be authorized by orders of this court.

It is further ordered that this order shall take the place, and be in lieu of a former similar order of this court made and filed on the 1st day of June, A. D. 1895, which said order is hereby revoked and annulled.

N. C. COLLIER,
Judge of the District Court of the Second Judicial District of the Territory of New Mexico.

A similar order being made in the district court of the fourth judicial district of the Territory of Arizona and in the United States circuit court for the southern district of California, in the cases therein pending as aforesaid subsequent to the making of the order in New Mexico and prior to the execution of this deed.

In witness whereof, the receiver has hereunto set his hand this 5th day of August, A. D. 1896.

C. W. SMITH, *Receiver.*

(Endorsed:) Warranty deed. Atlantic & Pacific R. R. Co. to Edward B. Perrin. Territory of ——, county of ——. *ss.* This instrument was filed for record on the — day of —— A. D. 189– at — m. and duly recorded in Book — on page —. —— —— register of deeds.

72 By Mr. Doe: We rest.

At the close of the testimony in the case defendant moved the court for a judgment in his favor and that plaintiff take nothing by reason of his said suit, which motion was in words and form as follows:

(Title of the Court and Cause.)

Now in conclusion of the plaintiff's testimony the defendant moves the court for a judgment in his favor and that plaintiff take nothing by reason of his suit for the reason that the evidence introduced by plaintiff does not establish any title of plaintiff to the premises in question and does not prove facts sufficient to establish a cause of action in favor of plaintiff and against defendant.

Which motion was by the court over-ruled and denied, to which ruling of the court the defendant then and there excepted.

73 *Defense.*

J. A. LAMPORT, a witness on behalf of the defendant, was then called and sworn and testified as follows: I am a surveyor; I know the premises in question, the northwest quarter of section fifteen, township twenty-five north, range 3 west; I was there in July or August, 1898; at that time I found a house and well excavated, I think, on the northwest quarter of section fifteen, township and range you mentioned, and the gulch running in a northwestern direction from the place coming down to it and some other improvements down below that—corral and water troughs; the gulch I speak of, is a gulch coming down there with some cliffs of rock on the north side, more gradual slope on the south side with some vegetation, locust trees bunched in the gulch; at the head of the gulch was a kind'o abrupt wall up against a rim and the gulch kind'o ended there; that is the close gulch did. At somewhere about 8 or 900 feet above this cabin, the gulch ended as a box gulch and ended more gradually on the top of the mesa; the wall rock at the head of the gulch was somewheres about 15 or 20 feet high of malapai rock; starting at the head as you go down you find locust brush and up part of the way on the sides, for maybe 15 feet to 50 feet wide, I also saw a couple of holes that had been excavated somewheres about 4 or 500 feet below this wall rock; one of
74 them had water in it, the other one had caved, I saw no water in it. Going down below there the brush had been cut out, but seemingly it was about the same character of country that the other was before it was cut. Further down there was a well there with some water in it; a shaft sunk; there was a pipe line running into it and water was gravitated out; the pipe was 10 or 15 feet from the top of the shaft or well, I should think, I didn't measure it; the pipe runs in a southeasterly course down to this corral; I guess it is 4 or 500 feet. The water at that time stopped in the trough there; there was a reservoir there; the water was running in the troughs at the time, the reservoir had some water in it; if I remember rightly the pipe was either one inch or three-quarters. I should judge the character of the channel is such a channel as you would naturally look for water in it by the indications of vegetation; the channel was a channel where naturally water would run from snow and rain on top; I don't know what the under part of it is, I didn't excavate any. Right in the wash in the bottom, where the flood waters would run down, I should judge it was 10 or 15 feet wide; the bank northeast above the house is a rocky malapai bank, I should suspect it's 50, maybe 75 feet high; the other bank is not quite so high; it is a divide; it splits another draw that comes in from the south part and I guess that runs all the way from 15 to 20 feet high, probably 50 feet high. As you go back of the wash it gets higher. This channel I speak of, is a
75 defined natural water course in which water flows upon the surface at times during the year; it's got defined banks.

The shaft or well that was sunk by the house is right there in the channel; it may be to the south side a few feet, but practically right close; I didn't go down to examine the shaft particularly. I made a survey of this place and prepared this map; it is a correct representation of the situation there (referring to the map attached to defendant's cross-complaint). This place up here (indicating on the map) is another spring on another section.

Cross-examination.

By Mr. DOE:

(Indicates upon the map the course of the gulch.) This being the wall, this being the cabin; the course of this gulch is northwest running up towards this mesa; the other spring is over here (indicating). I was there in the summer of '98, I think I was there about two days. I went up this gulch and found this hole with water in it on both of these days; where the water was the hole was in the neighborhood of 3 feet in diameter, I don't know how deep it was, I couldn't tell how much water there was in it, I don't know whether it rained there recently or not; the country did not show that it had rained at that time.

C. E. HOWARD, the defendant, called as a witness on his own behalf, being sworn testified as follows: I am the defendant in this cause; I am familiar with the tract of land in question; I first knew it in the fall of 1890, I went out there; I bought some
76 sheep that fall from Nye and went out to get them. Abshire and Bishop were there in possession of the place—J. W. Abshire; I found the place virtually just about as it is now; it has a well and they pipe it further down the cañon; I haven't been down in the well, but it is right in the bed of the creek or cañon; it's the cañon that breaks over the rim of the mesa, it is a flat mesa, and stops behind the wall probably half a mile at the head of the cañon; at the head of the cañon it is very narrow and rocky and opens out as it runs into the plain. At the head of the cañon it is pretty steep; right at the head the cañon is narrow and the banks very steep; as you go down the draw it windens out, it is like all these dry creeks where water runs when it snows or rains; I have seen it run there till it filled up the well and we had to clear it out; the water went through the house, which is built by the side of the well. There is locust in the cañon; it is thick bunch of locust trees; they are right up in the head of the cañon and a good many have been thinned out. The passage is probably 30 or 40 feet square at the head of the cañon; they are 12 or 15 feet high; they are pretty thick and hard to go through. There is no evidence of water coming down the cañon from the surface other than the water from rains or snows; there has been explorations for water there in digging these wells. The first hole they dug is up where the place is fenced off for the garden. The first hole they dug, that has a windlass and is still

there and there was a little water in the bottom, and then they had followed down the cañon and there is the one at the
77 house being used, I should say 250 or 300 feet below that; the first one is probably 2 or 300 yards from the head of the cañon, I should judge; and as you come down there is a shaft or well at the house; besides this shaft there has been a tunnel driven in the bottom of the wells; they run right across the cañon about north and south; they were put there to collect the water in the channel and when there is more water run into the well we could shut it off and hold it to be kept from wasting it. In 1890 when I was there this water was being used for sheep; I used it to dip with; I paid them for the use of the dip half a cent a head; it came from the well through the pipe; the pipe runs from the well, I should say, about 4 or 500 feet; I never measured any of those distances. There are water troughs at the end of the water pipe now and as the water goes through these troughs and they are filled there is a round tank to catch the over-flow, a reservoir. They use the water to run sheep, and it has been used for the same purpose since; it has been used continuously ever since by them and myself. On the south side of the gulch the cañon widens out and this arroya keeps on to the steep bank on the north side, and at the house the other side is probably 2 or 300 yards, there is a gradual rise all the time; the arroya follows the bank to the north; there is a well defined natural water course in which water runs upon the surface during certain times of the year; it takes all the water that goes down there unless there is a cloud burst. I had negotiations with Mr. Abshire for the
78 possession of this place; I bought his possession—his right in 1892; I paid $2500; I took a deed at that time for the possession.

By Mr. DOE: I object to the introduction of the deed on the ground that the defendant claims only under right of possession or by possession only without right and a deed is irrelevant and immaterial to any issue in the case.

By Mr. DOE: On the face of the pleadings they show that he had never appropriated the water, I mean to say that he ever had color of title.

By the COURT: Let him introduce it. The objection will simply be that it is immaterial.

Which deed being Defendant's "Exhibit A" was then introduced in evidence subject to the objection, which is in words and figures following:

DEFENDANT'S "EXHIBIT A."

Quit Claim Deed.

This indenture made this 8th day of June A. D. 1892, between J. W. Abshire, party of the first part, and C. E. Howard, party of the second part, both of Coconino county, Arizona,

Witnesseth: That the said party of the first part for and in consideration of the sum of twenty-five hundred dollars ($2500) lawful money of the United States of America, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise, release and forever quit claim unto the said party of the second part, his heirs, administrators or assigns;

All that certain piece or parcel of land, including the water and all improvements thereon situated, known as the Abshire
79 place; located about thirty-five (35) miles northwest of Ash Fork, Arizona, in the county of Coconino, Territory of Arizona, on unsurveyed Government land,

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the revisions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with all the appurtenances, unto the said party of the second part, his heirs, administrators or assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand the day and year first above written.

J. W. ABSHIRE.

Witness:
F. W. SISSON.

STATE OF CALIFORNIA, } ss:
County of Sonoma, }

Before me, W. J. Eardley, a notary public in and for the county of Sonoma, State of California, on this day personally appeared J. W. Abshire, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 16th day of March, A. D. 1901.

W. J. EARDLEY,
Notary Public.

80 10c. revenue stamp cancelled W. J. E. March 16/1901.
[NOTARIAL SEAL.]

My commission expires February 15, 1902.

Endorsed: Filed Sept. 26, 1901, C. M. Funston, clerk.

At that time I took part possession of the premises and the water and pipes; they continued partly in possession; I was to take my sheep there and give them until snow came that winter to move their sheep away. We both staid there so they would have time to relocate or buy another place; after that I had complete possession. I know the plaintiff, Mr. Perrin; I have had conversation with him about this matter; he knew that I was there but he never spoke about it until after it was surveyed; after it was surveyed he asked me would I turn it over to him. Mr. Perrin was not here, but Mr. Thornton was here and knew from the start that I was in possession of the place, and since I have had conversation with Mr. Perrin about this place; I could not say whether Dr. Perrin knew of it at the time; there has never been a suit brought against me for the place until this one. I have been in the undisturbed and continuous possession, peaceable—since I bought the place from Mr. Abshire.

By Mr. ELLINWOOD: You admit the filing of this water location notice, don't you?

By Mr. DOE: I admit it in the pleadings that he filed a notice of which a copy is attached to your answer in the office of the county recorder. You don't allege the filing prior to ours.

81 By Mr. ELLINWOOD: No.

Notice was then read in evidence by Mr. Ellinwood, being Defendant's "Exhibit B" and is in words and figures following:

"EXHIBIT B."

Notice of Water Appropriation.

Notice is hereby given, that in accordance with act. No. 86, of the 17th legislature of the Territory of Arizona, I, C. E. Howard, of Coconino county, Arizona, have appropriated for irrigation, domestic, stock and other beneficial purposes, all the water hereinafter described. To that end I have made certain cross-cuts, tunnels and a well, in a certain, defined underground channel of water, thus making a flowing well and spring; also a certain ditch, pipe line and reservoir; all located at the place known as the Abshire place, held by me as a possessory right, about 35 miles northwest of Ashfork, Arizona, on unsurveyed land of the United States, said cross-cut, tunnel and well, are located about 10 feet from the dwelling house on said place; said ditch and pipe line running from said cross-cuts, tunnels and well a distance of about 200 yards easterly to the said reservoir.

My appropriation covers all the water which now flows, or may hereafter flow, in the above described underground channel, and all the surface, surplus or flood waters that flow in the arroya or wash above the said underground channel.

usually kept two bands; there are about 2000 in a band; in 1899 it was pretty dry; he had all his sheep away nearly then; I don't think he had any there during the summer of '99; he might have had a few during the spring; '98 was dry; I think it was more seasonable in '97. In 1899 we leased some water near there, in the fall of '99; at that time Mr. Howard didn't have any water and didn't have any sheep there, and we leased a tank or dam made in a little cañon that had a good deal of water in it. I think Mr. Marvin Johnson had a dam leased in that country from the Owen boys, not probably 20 miles from Howard's; I don't know what they paid. I an not able to estimate in a general way what the rental value of that property has been this year; I don't know what the rental value of that place would be for the years from 1897; it would not be worth a great deal because it has not had a great deal of water in it. Stock men usually lease in dry times in the fall of the year when the water is scarce; I don't think of any that is made in the spring, no, sir; they are usually made in the fall, yes, sir.

E. B. PERRIN, JR., witness on behalf of the plaintiff, being duly sworn testifies as follows: I reside in Williams; I am a son of E. B. Perrin, plaintiff, in this action. I have been on the northwest quarter of section fifteen, township twenty-five north, range three west Gila and Salt River meridian. It is a part of the land
57 claimed by my father and is the tract occupied by Mr. Howard; I have more or less familiarity with the rental values of land of this character with water on it; my father owns some considerable tracts of land; I have some thing to do with the management of it; my father owns about 210000—212000 acres; every summer for the last three years I have spent from two to three months out with the sheep on this land; I was on this particular 160 acres about ten days ago; that is the only time I have been right on the land; I am pretty well acquainted with all the country through to Seligman and south of Seligman for a number of miles and north of Seligman for some distance, ten or twelve miles, and back to Williams; it adjoins the country in which this land in question is situated; it adjoins it on the south some miles; the character of the country is very similar. We examined the water that was there now, but from present conditions you could not tell how much was flowing; the water was up to the pipe in the well, but it was not flowing out of the pipe at the other end; it was some five inches above so you could not tell how much water would run out with the pipe lower; it must have been the pipe raised or stopped up; the water was not running; there was water in the spring or well; it did not run out for some reason.

By Mr. DOE: We now offer in evidence the deed from the Atlantic and Pacific Railroad Company to E. B. Perrin, plaintiff. All the signatures are acknowledged, which deed is marked "Plaintiff's Exhibit C" and is in words and figures as follows:

58 PLAINTIFF'S EXHIBIT "C."

Atlantic and Pacific Railroad Company, Western division.

Warranty Deed.

This indenture, made this thirteenth day of January, one thousand eight hundred and ninety seven, by and between the Atlantic and Pacific Railroad Company, a corporation created by and doing business under the act of Congress, approved July 27th, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," party of the first part, and Edward B. Perrin, of the county of San Francisco, and State of California, party of the second part,

Witnesseth, that the said Atlantic and Pacific Railroad Company for and in consideration of the sum of seventeen thousand, two hundred and eighty dollars, ($17,280) to it in hand paid by the said Edward B. Perrin, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell and convey unto the said Edward B. Perrin, his heirs and assigns, all those tracts, pieces and parcels of land situate in the county of Coconino, and Territory of Arizona, to wit:

In township twenty-five (25), north, range three (3) west: Section one (1), six hundred and thirty-nine and sixty-eight one hundredths (639.68) acres, section three (3) six hundred and
59 thirty-nine and seventy-two one-hundredths (639.72) acres, section five (5) six hundred and forty and thirty-two one-hundredths (640.32) acres, section seven (7) six hundred and forty and twenty-four one-hundredths (640.24) acres, section nine (9) six hundred and forty (640) acres, section eleven (11) six hundred and forty (640) acres, section thirteen (13) six hundred and forty (640) acres, section fifteen (15) six hundred and forty (640) acres, section seventeen (17) six hundred and forty (640) acres, section nineteen (19) six hundred and forty and twenty-eight one-hundredths (640.28) acres, section twenty-one (21) six hundred and forty (640) acres, section twenty-three (23) six hundred and forty (640) acres, section twenty-five (25) six hundred and forty (640) acres, section twenty-seven (27) six hundred and forty (640) acres, section twenty-nine (29) six hundred and forty (640) acres, section thirty-one (31) six hundred and forty and twenty one-hundredths (640.20) acres, section thirty-three (33) six hundred and forty (640) acres, and section thirty-five (35) six hundred and forty (640) acres.

In township twenty-five (25) north, range four (4) west: Section one (1) six hundred and forty and twenty one-hundredths (640.20) acres, section three (3), six hundred and forty and forty one-hundredths (640.40) acres, section five (5) six hundred and forty and sixty-eight one-hundredths (640.68) acres, section seven (7) six hun-

dred and thirty-nine (639) acres, section nine (9), six hundred
60 and forty (640) acres, section eleven (11) six hundred and forty (640) acres, section thirteen (13) six hundred and forty (640) acres, section fifteen (15) six hundred and forty (640) acres, section seventeen (17) six hundred and forty (640) acres, section nineteen (19) six hundred and thirty-nine and twenty-four one-hundredths (639.24) acres, section twenty-one (21) six hundred and forty (640) acres, section twenty-three (23) six hundred and forty (640) acres, section twenty-five (25) six hundred and forty (640) acres, section twenty-seven (27) six hundred and forty (640) acres, section twenty-nine (29) six hundred and forty (640) acres, section thirty-one (31) six hundred and thirty-nine and eighty one-hundredths (639.80) acres, section thirty-three (33) six hundred and forty (640) acres, and section thirty-five (35) six hundred and forty (640) acres.

The townships and ranges above referred to lie north and west of the Gila and Salt River principal base and meridian, and contain twenty-three thousand and thirty-nine and seventy-six one-hundredths (23,039.76) acres.

Reserving, however, to the said Atlantic and Pacific Railroad Company all that portion of the land herein described (if there be any such) which lies within lines drawn parallel with an one hundred feet in width on each side of the center line of its railroad, as now constructed or hereafter to be constructed, and any greater width where necessary permanently to include all their cuts, embankments,
and ditches, and other works necessary to secure and protect
61 the main line of said railroad, and also reserving the station grounds, if any there be, within the above described lands. Also reserving the right of way for a pipe line or lines twenty-five feet in width; also the right of way for an open ditch or ditches fifty feet in width and any greater width where necessary to permanently include all cuts, fills and embankments and other works necessary to secure and protect said pipe and ditch lines constructed, or to be constructed, for the purpose of conveying water for the use or uses of said Atlantic and Pacific railroad from any spring, creek or river, or from any well or reservoir or other source of water supply which it has now, or may hereafter construct or acquire.

To have and to hold the said premises, with the appurtenances, unto the said Edward B. Perrin, his heirs and assigns forever. And the said Atlantic and Pacific Railroad Company doth hereby covenant with the said Edward B. Perrin, his heirs and assigns that it is lawfully seized of the premises aforesaid; that said premises are free and clear of all incumbrance whatsoever; except such parts or portions as may have been lawfully appropriated to public roads and highways or other public uses; and the said Atlantic and Pacific Railroad Company will forever warrant and defend the same, with their appurtenances unto the said Edward B. Perrin, his heirs and assigns against the lawful claims of all persons whomsoever.

In witness whereof, the said Atlantic and Pacific Railroad Com-

pany has caused this deed to be signed by its president, and
62 attested by its secretary, and sealed with the common seal of said corporation, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
[SEAL.] By ALDACE F. WALKER, *President.*

Attest:
H. W. GARDINER, *Secretary.*

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this 13th day of January, A. D. 1897, before me D. J. Sheehan, a notary public of, in and for the State of New York, residing in the city of New York, came the Atlantic and Pacific Railroad Company by Aldace F. Walker, its president, and H. W. Gardiner, its secretary, who are to me well and personally known as the same persons whose names are subscribed to the foregoing instrument and they duly acknowledged that they signed, sealed and executed the said instrument of writing as their free and voluntary act, and the free and voluntary act of the said railroad company, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal this 13th day of January, A. D. 1897.

D. J. SHEEHAN,
Notary Public.

63 Know all men by these presents, that I, C. N. Sterry, acting land commissioner of the Atlantic and Pacific Railroad Company, do hereby certify that the price named for the land described in the foregoing deed is just and reasonable. This certificate being made in compliance with article three of the first mortgage by said railroad company to the United States Trust Company of New York, trustee, dated July 1st, 1880, and article three of the second mortgage made by said railroad company to the Mercantile Trust Company of New York, trustee, dated September 1st, 1887.

In witness whereof, the said land commissioner has subscribed his name the day and year first above written.

C. N. STERRY,
Acting Land Commissioner.

The Mercantile Trust Company, trustee, under the second mortgage, dated September 1st, A. D. 1887, executed and delivered to it by the said Atlantic and Pacific Railroad Company, in consideration of seventeen thousand, two hundred and eighty dollars ($17,280) (being the proceeds of sale of the above conveyed premi-

ses), paid by the said railroad company to the United States Trust Company of New York, trustee under the first mortgage, does, as such trustee under said second mortgage, hereby release and forever discharge the hereinbefore conveyed premises from the lien and encumbrance created thereon by the said second mortgage.

64 In witness whereof, the said The Mercantile Trust Company has caused this release to be signed by its vice-president, and attested by its secretary, and sealed with the common seal of said corporation, this twenty-first day of January, A. D. 1897.

THE MERCANTILE TRUST COMPANY, *Trustee.*

[SEAL.] By H. C. DEMING, *Vice President.*

Attest:

E. R. ADEE, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this 21st day of January, A. D. 1897, before me, the undersigned, a commissioner of deeds for the Territory of Arizona in and for the State of New York, residing in said city of New York, came the Mercantile Trust Company, of New York, by H. C. Deming, its vice president, and E. R. Adee, its secretary, who are to me well and personally known as the same persons whose names are subscribed to the foregoing instrument, and they duly acknowledged to me that they signed, sealed and executed the said instrument of writing as their free and voluntary act and deed, and the free and voluntary act and deed of the corporation above named, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal this 21st day of December, A. D. 1897.

[SEAL.] WILLIAM H. CLARKSON,
Commissioner of Deeds for the Territory of Arizona in New York.

65 The United States Trust Company of New York, trustee, under the first mortgage, dated July 1st, A. D. 1880, executed and delivered to it by the said Atlantic and Pacific Railroad Company, in consideration of seventeen thousand, two hundred and eighty dollars ($17,280) paid partly in cash and partly in the obligation of the Saginaw Lumber Company under its agreement with said railroad company, dated January 5, 1894, being the proceeds of sale of the above conveyed premises, to it paid by the said railroad company, the receipt whereof is hereby acknowledged, does, as such trustee under said first mortgage, hereby release and forever discharge the hereinbefore conveyed premises from the lien and encumbrance created thereon by the said first mortgage.

In witness whereof, the said United States Trust Company of New York has caused this release to be signed by its president, and attested by its secratary, and sealed with the common seal of said corporation, this 13 day of Jan. A. D. 1897.

UNITED STATES TRUST COMPANY
OF NEW YORK, *Trustee*,
[SEAL.] By JOHN A. STEWART, *President*.

Attest:
H. L. THORNELL, *Secretary*.

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this 13th day of January A. D. 1897 before me the undersigned, a notary public in and for the State
66 of New York, residing in the city of Brooklyn, New York, came the United States Trust Company of New York, by John A. Stewart, its president, and Henry L. Thornell, its secretary, who are to me well and personally known as the same persons whose names are subscribed to the foregoing instrument, and they duly acknowledged to me that they signed, sealed and executed the said instrument of writing as their free and voluntary act and deed, and the free and voluntary act and deed of the corporation above named, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal this thirteenth day of January, A. D. 1897.

HENRY C. KENNEDY,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed, N. Y. Co.

The within and foregoing deed executed by the Atlantic and Pacific Railroad Company to Edward B. Perrin was made and executed upon the request of C. W. Smith as receiver of the property of the Atlantic and Pacific Railroad Company, duly appointed as such by the district court of the second judicial district of the Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States, and by the district court of the fourth judicial district of the Territory of Arizona, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States, and by the United States circuit court for the southern district of California, in causes pending
67 in each of said courts, wherein The Mercantile Trust Company of New York was and is plaintiff and The Atlantic and Pacific Railroad Company and The United States Trust Company were and are defendants to carry out the prior agreement made by the A. & P. R. R. Co., and also by the receiver of the A. & P. R. R. Co.,

to get under this solid formation that held the water in order to catch all the water that come in. The formation was the same as above; the water came in the same way down the cañon from the other place down the wash; that was about all the work I did for them there in the way of prospecting for water. I had
89 nothing to do with the tunnels except to clear them out afterwards. The tunnels were run in a southwesterly direction—more south than west, and the other was run in a northeasterly direction, kind of V shape coming in across the channel. The tunnel was cut very small just barely room to get through, you could walk in it, it was timbered over head. One of these tunnels was about 18 feet long and the other about 20 feet V shaped coming to the second well. The formation in the tunnels above this granite wash was dirt and rock, it seemed to be a deposit from the hillside and slid in there. Both tunnels were the same. I saw the water coming in through the tunnels from the west through the wash. I examined that closely to see where the water was coming from when I cleaned that out; I cleaned it out to the solid formation so as to find out where the water was coming from; I wanted to see whether the most of the water was coming from the north tunnel or coming from the south.

Cross examination.

By Mr. Doe:

At the time I cleaned them out the well was standing full of water and gravel, it had all washed in and filled in; I cleaned the whole thing out first and of course the gravel was filled with water and I couldn't tell unless I waited two or three days where the most did come from, the north or south tunnels. It's granite wash that holds the water up; I couldn't tell when I cleaned it out which tunnel did run the strongest. This granite wash is fine sand and perfectly tight, hard like, you could cut it on a grindstone—
90 it is a kind of a cement, hard cement.

James W. Stone, a witness called on behalf of defendant, sworn and testified as follows: My name is James Stone; I live north of Ash Fork in the country; I am familiar with the Abshire place which is now known as the Howard place. I have known the place since the fall of 1887; at that time there was no improvements there; there was a growth of locusts or something of that kind, growing there that attracted my attention; there's a channel called a cañon or arroya there, something of that kind, I could not say the exact extent of this growth of locusts, although it was a rank growth; locust bushes growing there probably I would say 15 feet high, and up and down the arroya some 200 yards, I should judge, and from 20 to 60 feet wide; there is a defined natural water course there in which water runs on the surface at certain times of the year and flows in the wet seasons. I have seen the

place since the water was developed; I never paid any particular attention to it; there is several wells dug along the creek there and some tunnelling; I have never been in the tunnels, I have looked into the wells; I have been to the place when there was an inch pipe, I should judge, seemed to be flowing about full and then I have been there when there was quite a small stream, it varied owing to the seasons. This pipe where the water was flowing was probably 3 or 400 yards below the well where it's piped out into the troughs; the flow was continuous at the time I noticed it; of course it would change with the seasons. It would flow continuous
91 the pipe full, again it would be of less volume; whatever flow there was was continuous. In the first place Mr. Abshire and Bishop were using the water for watering sheep and I believe Mr. Howard has used it for the same purpose since he has had it. Since the place was located Mr. Abshire and Bishop had continuous possession of it until they sold to Mr. Howard and he has had continuous possession of it since that time.

JUDD BISHOP, a witness called on behalf of defendant, sworn and testified as follows: I reside at Ash Fork; I know the place commonly known as the Abshire or Howard place; I first knew it I think it was in August, 1888; when I first saw it there was nothing but a bunch of timber, cedars, brush of most all kinds that grow in that country. There was an arroya, cañon or channel; it's a short draw, heads up there in a short cañon, breaks off at the rim. John Bishop was with me; we went there to dig a well and dug a well right in there close to the cañon and found water; the water come down through the arroya; we dug the well and started in to water sheep and there was not water enough where we dug and we came down below and dug another well, that was two or 300 yards below. The wells were dug right in the wash; we sank the last well about 10 feet; it was about 2 or 300 yards from the first one; we struck water there at about 9 or 10 feet in that lower well. The formation was malapai on top and a kind of granite when we got down where we struck the water; the water came in to the well from right down the cañon; we got a good deal of water at that time,
92 it was continuous for 3 or 4 years, 5 years; we pumped it for a while and then we put in a ditch to run the water out; we put in a pipe, I think about 3 or 400 feet; we started in with a 2 inch pipe at the top, and I think it was an inch and one-quarter where we run it into the tunnels; the pipe flowed full for 3 or 4 years, continuous flow. I have seen water run in this arroya upon the surface; there was a tunnel run right north and another one south across the channel; they were narrow tunnels just wide enough for a man to stand up in, I think one was about 10 or 12 feet, 15 feet. I think it was about 15 each way as near as I can remember. The results of digging these tunnels was that the more we tunnelled the more water we got; they deflect the water. The water came in from the north side and down the main cañon from up the

arroya. I have been in that country since 1887; I am familiar with the watering places in that vicinity; I have rented water places in that country; I have an opinion as to what the rental value would be in a wet and a dry season for a place like this Howard place.

Q. What is that?

By Mr. DOE: I object; I would like to question the witness.

Q. What do you mean by compared to the same kind of places, do you mean ranches with living water, wells and springs?

A. Yes;

Q. And they control the same character of range as this?

A. Yes.

Q. Equal quantities of land subject to the water that you know of?

A. Well, I have rented the water.

Q. What place do you know of in that part of the country where there is a well or spring of water and no other water similar
93 near, that would control, in other words an equal area of grazing ground?

A. Well, I rented the Sellers dam, that's right south from there about 8 miles; I rented that for 2 years.

Q. That was a dam?

A. Yes, sir.

Q. What was the nearest water to it?

A. About 6 miles.

Q. About 6 miles and outside of this little spring where's the nearest water to this well that is in controversy?

A. Well, do you mean in wet times or dry times?

Q. I mean permanent water.

A. O, it's about 10 miles.

Q. Well, what other places do you know of that has been rented?

A. Well, I don't know of any other places with springs; I know of lakes.

Q. Well, was there any other water within 8 or 10 miles from there?

A. Yes, sir, 5 to 8 miles from the places.

Q. Would there be any difference in the distance that a place was from other water for the purpose of watering stock as to its rental value?

A. Well, yes.

Q. Well, do you know what this other place rented for?

A. I have known of them renting for different prices, not of my own knowledge, just hearsay. All that I know that I rented a tank from Sellers, I know nothing further than that of rental value of this class of property except by hearsay.

By Mr. DOE: I object to the competency of the witness.

By the COURT: The objection is overruled.

By Mr. ELLINWOOD: What is your opinion as to the annual rental value during the dry season of the Howard place?

By Mr. DOE: I object.

By the COURT: The objection is sustained. What is the annual rental value?

By Mr. ELLINWOOD: Well, what is the rental value?

94 A. The last 3 or 4 years I don't think it has been worth anything, there's been no water there. There has been a time I suppose when it would be worth a couple of hundred dollars a month, when it used to run so much water and there was so much grass there; I couldn't say the average rental value. When there ain't water enough to water a band of sheep I shouldn't think it would be worth anything; the last 3 or 4 years there has not been water enough to water more than one band of sheep; I don't know that there has since February 1897; I haven't paid much attention to it; I know it has been short of water; I do not think there has been any annual rental value since that time—no, not a great deal. When I speak of the rental value of $200 a month I mean at the time I owned the place there, with that amount of water they could water 12 or 15000 head of sheep, and there was plenty of range for them. Controlling all the water in that country and plenty of grazing, I suppose a man could afford to pay $150 or $200 a month, probably for two or three years; those conditions had not existed since 1897.

Cross examination.

By Mr. DOE:

I haven't been to the place for 4 or 5 months, think I was there March last; I staid over night; before that I was there last fall sometime; I have been there off and on every once in a while since I sold the place, since it has been sold, passing through different times; there was water there last March; I don't remember whether there

95 was any water in the dam or not; there was seven or eight troughs full; I had some horses and watered there and staid all night. I have had litigations with the plaintiff and have been upon very bitter terms with him.

JOHN D. BISHOP, a witness on behalf of the defendant, being duly sworn, testifies as follows: My name is John D. Bishop; I live at Ash Fork; I am acquainted with the Howard place; I first knew it in 1888; when I first knew the place there was a well put down by Abshire and Bishop; the well was about thirty-five miles north of Ash Fork; it is in an arroya, right in the center of it; I was not there when the well was being dug, I have been there since. I have been in the well; the water comes from right down the arroya in the well; there were two wells there in 1888; the other well was up above about 250 to 300 yards; there was water in both wells—it come down the arroya. The formation in the bottom of the well I would call a granite; I believe there has been tunnels connected with these wells since, one goes south and the other goes north,

southwest, I think; the lower well is right in the channel; I can't tell whether the upper one is or not—the lower one is. I have been in this country thirteen years engaged in stock business. I am familiar with the annual rental of places of that character.

Cross examination:

I know of the Sellers place being rented by the Owen boys—it's about 20 miles west of this Howard place; they have a dam,
96 a reservoir—it's about 3 miles from other water from Ross and Walsh place; I don't think it would make any difference whether there was other water where stock could be watered within 3 miles or 10 miles as to the rental value; yes, one could graze as many cattle as sheep; they would have to water or they would not have many stock; if he didn't have any range he wouldn't have any use for water; yes, it would make a difference whether water was within 3 or 10 miles; I don't know what my brother paid Sellers; Murphy had it rented; I know what we paid. The only means of forming an opinion as to the value of water is what I paid for the use of the tank.

By Mr. DOE: I object to the competency of the witness.
By the COURT: He may state his opinion.
By Mr. DOE: Note an exception.

By Mr. ELLINWOOD: What is your opinion of the annual rental value of that place since February 1897?
A. Well, they have not been able to water any sheep there for about three years.
Q. Well, when they were able to water sheep?
A. O, about $40 a month.

Cross examination.

By Mr. DOE:

Off and on once in a while they would water sheep there, but they could not stay there; I don't think they watered any sheep only a band there once in a while for the last year; they have sheep over there, but would not water there; I don't know that in each year they have not watered part of the time one band and part of the time two bands; a man told me they only had sheep there once in a while; had moved them through; I have not had litigations and bitter feelings with the plaintiff in this action—my brother has.

97 JAKE KAUFFMAN, a witness called and sworn on behalf of the defendant and testified as follows: I live at Williams; I know what is known as the Howard place north of Ash Fork; I have been there; I have known it for the last ten years; I know of an arroya or well that comes down past the house; I have been

there and worked in the wells; I should judge the wells were pretty close to a quarter of a mile from the top of the rim. I worked, both of them, a year ago next month; I cleaned the wells out and cleaned the tunnels out and the water comes down the wash; for instance, that's the shape (indicating on the desk) it's in, and one well's here and the other is over there, and this well is about 30 feet from the north bank, and there's where the water comes in from the middle of the channel. I was in both wells. The formation in the bottom of the well is a kind of cement and gravel; there is not very much water coming down there at the time when I went there, but I cleaned them out and before we left there was considerable water; I think that's a year next month I was there; you could see where the water come in that way from the draw that runs up the mountain to the rock—the ledge.

Rebuttal Testimony.

J. B. GIRAND, a witness called on behalf of the plaintiff, was sworn and testified as follows: I am a civil engineer and surveyor; I am acquainted with the premises involved in this action; I have recently been there; I went there for the purpose of establishing the lines of section fifteen and to examine the improvements on
98 the place; I found water there, it was mostly in troughs—a little tank down there, and in two wells; there was about the same in each well,—I believe there was more water in the upper well or the well to the west than there was in the other well; of course there was a tunnel leading from the west well and that had some water in it too; taking that into consideration there was more water in the eastern well than there was to the west; the wells were about sixty feet apart; one was on lower ground than the other—the one in the higher ground was deeper than the one in the gulch—the lower well; there is a gulch there, one of the ordinary gulches of the country—just an ordinary gulch. I couldn't say whether there was any differenee in the water flowing in it from the other gulches common gulches all over the country; I presume water would flow in any of these gulches when there was a cloud burst or heavy melting snow. My experience with engineering and water and those things has extended over a perio*f* of twelve years; of course not all the time particularly in water. I saw there two wells and the tunnel or tunnels that were driven to connect them in different directions, with the water in them and water in the tunnel. I don't think I could determine whether there was an underground stream or whether it was seepage, but my opinion would be that it was water that—I saw the formation of the country and the character of the rock and the wells.

Examination.

By Mr. ELLINWOOD:

I was in one of the wells; there was water in the well;
99 I went down as far as the ladder went; I could not say whether the well was down to bed rock; I didn't see any water coming into the well, I didn't go down into the tunnel; the wells were about sixty feet apart; I am not sure whether the wells were connected with the tunnel,—I think they are, I couldn't swear that they are. I didn't step into the water nor pipe the water out, my idea is from looking into the well and looking at the rock around. The formation below the well is a sort of a valley; it opens at the wells into the valley you might say; one might follow the course of this surface stream, when there is a surface stream there,—probably a few hundred feet; there is a junction of several gulches below this one that come together; below the gulch is a wide open valley, probably where the gulches come together it's a thousand feet; there is no channel. Very little vegetation below there now; it's mostly weeds at the present time; there's cedar trees, but not many in the open valley.

Examination.

By Mr. DOE:

The high ground above where the gulch comes out is covered with cedars and malapai boulders—stones, similar to a large part of this country; the vegetation and the character of the rock. I don't know as to the water shed; I never went over the water shed; there is a rim of rock, probably fifty feet higher than the gulch below; there is a place where the gulch breaks through into the mesa; that particular gulch is probably a quarter of a mile long
100 until it breaks into the top of the mesa—that ends the channel; it does not cut through the mesa—it's just a gulch formed in the outside edge of this mesa.

By Mr. DOE: What in your opinion are the probabilities of the water in these wells being surface water, percolating water or coming in well defined stream of defined walls?

By Mr. ELLINWOOD: I object; the witness has not qualified himself as an expert.

By the COURT: Have you made a study of underground flow of water in this country?

A. No, sir, I have not.

By the COURT: Well, I will sustain the objection.

By Mr. DOE: Note an exception.

WILLIAM LOCKRIDGE, a witness called on behalf of the plaintiff, being duly sworn testified as follows: I have been working for Mr. Girand as instrument man for the last two years; I have been to the place in controversy known as the Howard place, 40 miles northwest of Williams twice; I saw two wells—what they call wells in this country; I made an examination of them; I went in one of them, the one to the north of the house; it was the one they use tunnels in; I went into the tunnel, the tunnel that runs kind of southwest about 20 feet, and there is a tunnel running northeast; when I first went into the tunnel I could hear some dripping—dripping of water I mean; I couldn't say how much of a flow it would have made; the water that was coming out of the pipe at the troughs was about half the size of a lead pencil, I should judge; that was on the 20th of September, I think, of this year.

101 Cross examination.

By Mr. ELLINWOOD:

I went into the water; the water was probably a foot and a half deep in the well and about five or six inches in the tunnels. The formation in the bottom of the well is a kind of gravel-y formation; I couldn't tell whether these two wells were connected with the tunnels, I got scared out after I was 22 feet; I didn't like the looks of the tunnel very well going through; I went in 22 feet; I went into the other tunnel, I should judge, about the same distance—I believe it turned there and went east; I went out with Mr. Girand for the purpose of making an examination to testify in this case. I mean I was scared by the danger of the tunnelcaving.

A. E. MCCOMBER, a witness recalled on part of plaintiff, sworn and testified as follows: When I was at the Howard place the water was from that well, a rather shallow well that had been dug there, and the water diverted from that by means of a pipe down into a little reservoir in the lower portion of the valley. There was quite a fall from the well so that they put a trench or tunnel through to get the pipe down to the water so as to divert it down below. I only went there for the purpose of identifying the land on which the water was situated and we went there and passed around a little field to a road and come to the northwest corner of section fifteen on which the spring is located. I then traced the line east to the quarter corner and also to the section corner, but I didn't pass up over the wash where the spring or well is situated, coming from the
102 northwest and I didn't go up that cañon. I didn't explore that; didn't go any further than the section corner, and on the line; there is a,—it looked to me like a ledge there on the north side of the section; there's a little flat, a little area above the water, above this well, of alluvial soil that had accumulated there and there is something of a shed there and it would take some explora-

tions to learn how extensive the shed was, and this well made at the lower portion of this alluvial deposit there where the fields are was where the well is located; I saw no evidence of a subterranean stream; this well, I should judge, as far as I can recollect, is about eight feet deep; they dug down there some where on a level to the alluvial soil,—and the deposit of water would be my theory of this water, percolating from a deposit into the well; possibly a spring might exist there to supply the deposit above there in this little field. I examined the well,—there was some water in it; I didn't make such an exploration as I would like to, but I should think that was the theory.

By Mr. ELLINWOOD: I object to what he thinks.

By the COURT: Yes, his opinion I guess will not go in. Can you tell how thick this deposit was?

A. I should judge not very deep; I saw some little excavations of rock down in the bottom of the well; it probably went down somewhere near the level—down to the rock of that field. As near as I can recollect the well was about eight feet; it might have been more. From where the rock showed at the surface on one side of the stream to where it showed on the other was quite narrow,
103 I should think it was one hundred feet or so; I went up the wash; I didn't go up to the other spring on the other section, I don't recollect that I saw the other well up at the arroya, I went up and went around it,—I followed the section line; I didn't go up to the other well. I saw some other excavations, but I didn't know whether above or below; there was excavations on the same section. I went there to identify the land on which it was located,—the spring was located, that was all I was asked to do.

Thereupon both parties rested, and the court instructed the jury as follows:

By the COURT:

GENTLEMEN OF THE JURY: It will be your duty to answer certain interrogatories submitted to you. These interrogatories are to be answered by you as you find those answers in the evidence,—as you find a preponderance of the evidence in the case to indicate the answers to these interrogatories. You will be as closely confined in ascertaining the truth of these interrogatories, to the evidence in the case, as you would be were the general issues submitted to you in the shape of a general verdict.

The first question which will be asked, reads as follows: "Did the defendant's grantor go upon the land in question while it was unoccupied and unreserved."

This question is to be answered by yes or no, as you find the evidence in the case to determine.

The second question that will be put to you, is *put to you, is* this:

"Was there a subterranean stream flowing in a well defined
104 channel upon the premises about the year 1889?" Now, perhaps it's unnecessary for the court to define a subterranean stream. A subterranean stream is simply an underground flow of water in well defined channels, which percolates through the soil, gravel, or whatever may be the constituent of the earth, by force of gravity. It is to be distinguished from a mere reservoir of water or body of water which may find its way into the soil and there held, but which does not flow in well defined channels by means of gravity. You are to answer this question by yes or no as you find from the evidence in this case.

The next question submitted to you is as follows: "Did defendant's grantor, about the year 1889 or 1890, by means of sinking a shaft and running tunnels therefrom intercept the flow of such underground stream of water?"

If you find that there is such a subterranean stream flowing in a well defined channel upon the premises, you will answer this question by yes or no, and as the fact may be determined from a preponderance of the evidence in this case.

This question is also submitted: "If you have found that there was an underground stream of water upon the premises in question on or about the year 1889, did defendant's grantor divert the same and apply it to a beneficial use, to wit, for stock purposes?"

It's hardly necessary to submit that question to the jury; but it is submitted to you and you will answer it as you find the
105 fact to be.

The next question, number five, reads as follows: "If you hav*d* found that there was a subterranean stream upon the premises in question, was defendant's grantor the first person to divert and apply such water to a beneficial use?" You are to answer this question by yes or no.

Question number six. "If you have found that there was a subterranean stream of water upon said premises, did defendant's grantor intercept the same by means of a shaft and tunnel and convey the same by means of a pipe line to water troughs and a reservoir?"—which is to be answered the same way.

Question number seven. "Has the defendant and his grantor from about the year 1889 down to the time of bringing this suit been in the open, notorious, uninterrupted and peaceable possession, with the knowledge of the plaintiff, of the land and the shaft and tunnel and pipe leading therefrom and reservoir connected therewith, and using the water flowing therefrom for stock purposes?", to be answered by yes or no.

Question number eight. "Had the premises in question any annual rental value since February 2nd, 1897?" This question is to be answered by yes or no.

Question number nine. "If in answer to the last question you have found that the premises in question did have a rental value, state what such rental value was year by year since February 2nd, 1897.'

This notice is posted on the dwelling house at the place abov described, about ten feet from the cross-cuts, tunnels and well ther located.

82 Dated this 16th day of July, A. D. 1895.

C. E. HOWARD.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

Before me, C. H. Noble, a notary public in and for the county and Territory aforesaid, appeared C. E. Howard, known to me to be the person whose name is affixed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes therein expressed.

Given under my hand and seal of office this 16th day of July, A. D. 1895.

[SEAL.]

C. H. NOBLE,
Notary Public.

Recorded July 16th, A. D. 1895 at 5:20 o'clock, p. m.

C. A. BUSH,
County Recorder,
By W. M. MILLER, *Deputy.*

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

I, T. E. Pulliam, county recorder in and for said county and Territory, and custodian of the records thereof, do hereby certify; that the foregoing is a full, true and correct copy of the notice of water appropriation, of the Abshire place, by C. E. Howard, as the same appears of record in Book 1 of Mill Sites and Water Rights, at page 63, records of Coconino county, Arizona Territory.

In witness whereof, I have hereunto set my hand and seal of office, this 15th day of July, A. D. 1898.

[SEAL.]

T. E. PULLIAM,
County Record-.

83 By Mr. ELLINWOOD: After reading notice, which is hereto attached, I offer it in evidence.

By Mr. DOE: I object to it as immaterial and irrelevant.

By the COURT: Of course it goes in for what it is legally worth as evidence.

By Mr. ELLINWOOD: Now, Mr. Howard, since you have purchased that place, come into possession of it, what have you done in the way of improvements there of this water?

By Mr. DOE: I object to that as immaterial and irrelevant.

By Mr. ELLINWOOD: Don't think it is; if he has developed water there it is right in issue.

By Mr. DOE: You have said in the way of improvements.

By the COURT: You mean what he has done with reference to developing water?

By Mr. ELLINWOOD: Yes.

By the COURT: That may go in, but with reference to improvements that is immaterial.

By the WITNESS: Well, the first work I did on the well was caused by an overflow causing this to cave in and fill the whole thing, and I had to clean it and re-timber it. We cleaned it out at that time, but since then, the last dry years, I have run more tunnels; I have not increased the water any by the extra work; the shaft or well is right in the channel of the stream. When I bought the place the pipe was flowing full; the pipe was carrying off and probably kept it a few inches above the pipe in the well; the pipe is an inch pipe where it comes out; it is a two inch pipe at the well and then down to an inch and a half and then an inch and it flowed this pipe full; since that time the character of the flow has varied according to the seasons. In 1897 I could not say exactly, I should say that it did not
84 flow that full; it flowed probably from half to two-thirds full most of the time and other times it is hard to tell. The pipe line has a valve in it and we have shut that off at times if we were not using the water to hold it in the well, and times have been, of course, that that was shut off over night and the sheep come in the next day it would flow a good force for a while and then it would flow its normal amount. In '98 and '99 didn't flow enough to water the sheep; I have had one band there part of the time; I am watering none at all now. I have had one band most of this year; I have kept no particular record; had to bring everything away last year, there was no sheep there after July, and the year before there were no sheep in there at all after July; and there was two bands there till June and one band to July. In '98 they got out of water and were probably away from there three months; in '97 they were there most of the year. While I was on the place using that place for water the sheep, if there was any water on the outside, I would take the sheep on the outside to water them so I didn't water all the time there. I have other tanks or reservoirs in that vicinity. I cannot tell how many sheep I had there in '97 nor '98; sometimes I changed them around for dipping; there might be 3 or 4 bands at each ranch; I figured on keeping two bands there. In 1900 I had one band of sheep there to use and after they lambed they had two bands and they left, one in June and the other in July, and they didn't go back until February; in 1900 it was from July until the
85 latter part of February there was no sheep there at all. In '99 there were two bands there part of the time and part of the time there was only one. I run about 2000 or 22 or 2300 sheep in a band ordinarily. I have been in the sheep business since the fall of 1890. I never ran all the sheep there when the full amount of water was there, because the grass would not have stood it; I

have had more sheep there at times than others; this year I had one band there until, I guess it was about June, and after lambing they were put in two bands and they staid until July. I took them away because I couldn't get water enough. There was one staid there all the time, one band staid there all the time. I have two bands there now, but they are not watering there; they water part of the time at what is known as the Schaffer dam, and the rest in the dry lakes; there are a few dry lakes in the rainy season. I couldn't say when they watered at this place last; I haven't been there since early spring.

Cross examination.

By Mr. Doe:

The character of this gulch, the surface rock is malapai. I think there is no other rock visible than malapai, wouldn't be positive. In 1897 I couldn't say how many sheep I had to water there; sometimes there was some at one place and some at the other; I have only tried to run and water two bands there; I have had four places and run from 8 to 9 bands and keep them distributed about. Possessions of the place consisted of corrals and house and I staid
86 there and watered the sheep and lived there; I couldn't say how much sheep were there in '97; I think though, there was at least two bands there most of the year. In '96 I had to go away, but I think in '97 I staid there. In '98 they were not there all the time; they were always there in winter to lamb there and staid there until about June, I think, and then they went back in July and then came over to the lake; lambing is in May. They were there in the fall and then they had a rainy season and went back there whenever there was water. In '99 it was the same way; there was a little while in the summer, the rest of the year there was none after July—after June, but in June McLane was there for he sent one band to Ashfork and the other here; they had been there all the year prior to that. I sent the band to Ashfork for water; there was not sufficient water for two bands from this well; I got water at Ash Fork from the railroad company.

Re-direct examination.

By Mr. Ellinwood:

Other than the occupation and use of the house, corral and pipe line I had a pasture there, a horse pasture; it's built from a separate enclosure, fenced adjoining this tank and watering troughs so horses could come in it—runs up over the mesa; it has never been surveyed; it is quite a good sized pasture. I suppose it contains 4 or 500 acres; I have a garden there also; it is fenced separately from the house; the garden is at the southwest of this arroya; the

wash comes right through the garden; I have raised vege-
87 tables and corn there; that was about this well; we have raised corn, a little grain for hay, raised potatoes, cabbage, water melons and beans—never irrigated. The soil has been moist; we plowed it there in the spring and it is always damp. The soil away from the arroya on either side is gravelly; there is no moisture in the soil away from the arroya, none whatever.

ADAM CHUNING, a witness on behalf of the defendant, sworn and testified as follows: My name is Adam Chuning; I am familiar with the place known as the Abshire place north of Ashfork now occupied by Mr. Howard. I first knew the place, I think it was in 1889; the first time I went there Bishop or Abshire, I don't remember which, came over and told me they wanted me to come and do a little work prospecting for water. I sank on a place that they had started for water; this place was near the head of a draw that comes down from the rim rock; I had a windlass and a bucket; the hole was down as, well as I remember, about 8 feet and we sunk it about 15 or 16 feet; we stopped on the formation of something I called a granite wash, you might call it bed rock, but it's granite wash; it's fine, gravel granite formation. I found water, it came in from the west from the upper side; it came from the high ground west and north from the head of the arroya from the west; it didn't come from any other side that I could see; I didn't particularly investigate to find out at that place that was worked on what was called
the upper wash; there was two places sunk there, I don't re-
88 member how much water flowed in at that time, I know they watered sheep there, a band, and I don't know but what they watered two bands some of the time.

Q. When you struck the formation of bed rock in this gravel, you say that the water came in from above up stream.

By Mr. DOE: I object to bed rock.

By Mr. ELLINWOOD: Well, this granite formation.

A. It's a granite formation as far as I prospected, a kind of granite wash that holds the water and water comes in on top of this because I dug on one side and watched to see if any water come below, and cut a ditch on one side to keep the water from coming in where I was sinking to find where the water was coming from. I found it come on top of this granite wash from the west and north; that would be up stream. It come down the wash, this little side cañon come from the rim. I didn't do anything after that for some time; I went back and went to work for Mr. Stone, and it was quite a while, it must be 6 months before I went there again to work and went to work cutting a ditch to pipe to another place they had sunk on the same wash; it was about 150 yards, I should say, further down the wash. In the shaft near this granite wash was at the bottom of the well, I went to work on a side hill slope and cut this ditch to the second well they had sunk and cut the ditch low enough

sand dollars, the same being at least double the amount of said judgment, and double the probable amount of costs of the suit of both the appellate court and the court below as fixed by the clerk of said district court; and the value of the rent or hire of said property in any suit which may be brought therefor; condition-that the said C. E. Howard, appellant, shall prosecute his appeal with effect and shall pay all the costs which have accrued in the court below or which may accrue in the appellate court, and in case the judgment of the appellate court shall be against him that he will perform its judgment, sentence or decree, and pay all such damages as may be awarded against him upon appeal.

117 Witness our hands and seals this 30th day of June, A. D. 1902.

C. E. HOWARD.
T. A. RIORDAN.
M. J. RIORDAN.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

T. A. Riordan and M. J. Riordan the sureties in the foregoing bond each for himself being duly sworn and not one for the other, deposes and says: That he is worth the amount for which he has signed the foregoing bond as surety over and above his just debts and liabilities exclusive of property exempt from execution.

T. A. RIORDAN.
M. J. RIORDAN.

Subscribed and sworn to before me this 30″ day of June, 1902.
My commission expires Jan. 19″ 1906.

JAMES L. BYRNES,
[NOTARIAL SEAL.] *Notary Public.*

I have fixed the probable amount of the costs of the suit brought in the appellate court and the court below at three hundred dollars, and I approve the foregoing nond this 30th day of June, 1902.

C. N. FUNSTON,
Clerk of the District Court, Coconino County.

118 (Endorsed:) No. 394 In the district court of the fourth judicial district of Arizona in and for county of Coconino. E. B. Perrin, plaintiff, *vs.* C. E. Howard, defendant. Supersideas bond Filed this 30 day of June 1902 at 5 o'clock p. m. C. N. Funston, clerk. E. E. Ellinwood, attorney for defendant.

119 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant.
} Assignment of Errors.

Comes now the above named defendant and assigns — his errors in the record and proceedings of this case the following, viz:

I.

The court erred in finding that the water in question was not a flowing stream with well defined channel or banks.

II.

The court erred in permitting the introduction o[illegible]tain testimony over defendant's objections, to wit:

1. In admitting Plaintiff's "Exhibit B," and
2. In permitting plaintiff's witness Macomber to testify as to the rental value of the premises in question.

III.

The court erred in over-ruling defendant's motion for a non-suit.

IV.

The court erred in allowing interest on the judgment of seven per cent. (7%).

120 V.

The court erred in rendering judgment for plaintiff notwithstanding defendant's plea of the statute of limitations and evidence introduced in support thereof.

VI.

The court erred in over-ruling defendant's motion for a new trial.

VII.

The court erred in rendering judgment in favor of the plaintiff and against the defendant.

E. E. ELLINWOOD,
W. C. CAMPBELL,
Attorneys for Appellant.

Endorsed: Filed this 20th day of September, 1902, at 9 o'clock a. m. C. M. Funston, clerk.

121 TERRITORY OF ARIZONA, *County of Coconino,* } ss:

I, C. M. Funston, clerk of the district court of the fourth judicial district, Territory of Arizona, in and for the county of Coconino, do hereby certify the foregoing to be a full, true and correct copy of all minute entries made in said case, a copy of the final judgment, notice of appeal, bill of exceptions containing all the evidence given in said case, bond on appeal and assignment of errors, a full, true and correct copy of all the original papers, files and proceedings on file and of record in said action and constituting the transcript on appeal of said case to the supreme court of Arizona before said district court, and I certify that E. E. Ellinwood, attorney of record for the above named defendant on the 26th day of Sept., 1902, demanded the foregoing transcript and that on that day I delivered the same to him.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Flagstaff, Arizona, this 26th day of September, 1902.

[Seal Fourth Judicial District Court, Coconino Co., Arizona.]

C. M. FUNSTON, *Clerk.*

122 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant, vs. E. B. PERRIN, Appellee. } No. 802. Appeal from the District Court of Coconino County. Hon. Richard E. Sloan, Judge.

Appearances.

E. E. Ellinwood and W. C. Campbell for appellant.
Edward M. Doe for appellee.

Opinion by Doan, Justice.

The appellee, E. B. Perrin, brought an action in ejectment in the lower court against C. E. Howard for the north west ¼ of sec. 15, twp. 25 north, range 3 west, in Coconino county, Arizona, based upon a record title in himself through mesne conveyances from the Government.

The appellant, C. E. Howard, in his answer claimed the property by right of possession only for a period of more than two years after plaintiff's right of action accrued and prior to the bringing of suit, and set up the statute of limitations in bar of the action. Defendant as cross-complainant further alleged in a cross-complaint that there was a subterranean stream of water running in a well defined channel,

through and under the premises, and that prior to any pub-
123 lic survey of the said land one J. W. Abshire appropriated all of the said waters for beneficial purposes. That the cross-complainant purchased the right of the said Abshire, and thereafter on the 16th day of July, 1895, and prior to any public survey of the land, appropriated all of the said waters in conformity with the provisions of the statutes at that time existing, constructed pipe lines and reservoirs, and applied said water to domestic, stock and other beneficial purposes, and had thus used the said water and all thereof since the said appropriation; that the use of the land in controversy is necessary to the cross-complainant for the maintenance and complete use and enjoyment of the water and waterways thus appropriated and used by him, and asked,

First. That the cross-complainant be decreed to be the owner by right of appropriation of all the water flowing into and through said subterranean stream or channel, and entitled to the exclusive use and benefit thereof.

Second. That defendant and cross-complainant be decreed to have a right of way over, through and upon the said premises for the maintenance, repair and use of said wells, pipe lines and reservoirs.

Third. That the plaintiff, the appellee herein, be enjoined from in any manner interfering with defendant's and cross-complainant's use of said water and waterways and entry upon the said
124 premises for the said purposes of use, maintenance and repair as aforesaid.

The stipulation on file signed by the respective parties and the evidence introduced by the plaintiff satisfactorily established that the land in controversy was acquired from the United States by the Atlantic and Pacific R. R. Co. under the provisions of an act of Congress dated July 27, 1866, and that it was conveyed by the said Atlantic and Pacific R. R. Co. to the plaintiff by warranty deed dated the 13th day of January, 1897.

It is established by the evidence that Howard's grantor went upon the land in question in 1889 when it was unoccupied and unsurveyed, and sank a well and developed a flow of water which he conducted by means of a pipe line to some water troughs about three hundred feet distant, and constructed a reservoir to impound the overflow, and that he used the water from such troughs and reservoir for stock purposes. That he afterwards sank a second well and excavated two tunnels deflecting from the sides thereof for the purpose of developing and storing a stronger flow of water, which he utilized by means of the aforesaid pipe line, troughs and reservoirs for stock purposes, watering and dipping sheep therein; that in the year 1892 he sold his possessory right to the premises and his improvements thereon, including the wells, troughs, pipe line and reservoir to the appellant herein, who from that time had remained in possession of the premises and continued the use of the
125 water for these purposes until the institution of this action.

It was also established by the evidence that the defendant

the appellant herein, on the 16th day of July, 1895, posted on the dwelling house on the premises a notice in accordance with act 86 of the 17th legislature, that he had appropriated all the water in a certain defined underground channel of water and to that end had made certain cross cuts, a tunnel and a well, also a certain ditch, pipe line and reservoir, all located at a place known as the Abshire place held by him as a possessory right on unsurveyed land of the United States, and recorded a copy of said notice on said date in the public records of Coconino county at page 63 in Book 1 of Millsites and Water Rights. The defendant claimed no title save such as this appropriation of water and the continuous occupation and use of the premises as a place to water stock may have given him.

The occupancy of the land by the defendant based upon the right of possession only does not avail against the plaintiff herein claiming under a valid record title. Par. 2222, Revised Statutes of 1887, (afterward amended by act No. 79 of the Laws of 1893 and incorporated in the Revised Statutes of 1901 as par. 3525,) under which the defendant claimed to hold this land as a possessory right, by way of establishing what was therein called "possessory rights" provided:

"That all persons who have heretofore or may hereafter settle "upon, cultivate or improve a tract of land in this Territory, with
"the view of acquiring title thereto under existing laws of
126 "the United States, shall be protected in the peaceable posses-
"sion and quiet enjoyment of said tract of land, with all the "improvements thereon, and all the wood, timber, soil and mate-"rials growing or being thereon, to the extent of one hundred and "sixty acres or one half mile square in compact form, if unsurveyed, "according to the cardinal points, and, if surveyed by the United "States, then according to the lines of said survey, so as to in-"clude such improvements."

This law gave to settlers the right to hold solely by possession land to the extent of one hundred and sixty acres, and provided for their protection in such peaceable possession, the only two requisites being that the land thus held should be unoccupied Government land belonging to the United States, and that the settler should occupy and hold the same with the view of acquiring title thereto under the existing land laws of the United States. The statute of limitations invoked by the defendant in this instance was evidently intended by the legislature to apply to such persons and would be available to bar an action between contesting parties of this class wherein neither party could claim title to the premises, but each claim only the subordinate right to possession subject to the recognized paramount title of the United States. The defendant has defined the character of his possession of this property in the notice introduced by him in evidence as posted on the dwelling house on the premises in July, 1895, by stating that it is

"the place known as the Abshire place, held by me as a possessory "right * * * on unsurveyed land of the United States."

But the establishment of the fact that the premises in question were not public lands of the United States at the time they were
127 settled upon by the defendant has excepted him from the provisions of that law, it being impossible to acquire title under United States land laws to other than United States public lands.

The lower court found as a fact

"1. That the said land was prior to the entry thereon of either "the defendant and cross-plaintiff or his grantor the property of the "plaintiff and his grantor and not public lands of the United "States."

This finding was fully sustained by the evidence as disclosed by the record, and as a conclusion of law therefrom the lower court held that "the defendant and cross-plaintiff was a trespasser upon the said land."

The appellant, though he urged this defense in the lower court, seems to have abandoned it in this court and relies upon his appropriation of water and his right to use the plaintiff's premises therefor. In his cross-complaint he alleges a prior appropriation of all the water flowing in a subterranean stream, running in a well defined channel, under and through the premises, and its use for beneficial purposes, and the necessary use and occupancy of the land in controversy for the complete use and enjoyment of the water thus appropriated. The Revised Statutes of 1887 provide:

"(3199) SEC. 1. All rivers, creeks, and streams of running water "in the Territory of Arizona are hereby declared public and appli- "cable to the purposes of irrigation and mining as hereinafter pro- "vided.

128 "(3201) SEC. 3. All the inhabitants of this Territory who "own or possess arable and irrigable lands, shall have the "right to construct public or private acequias and obtain then eces- "sary water for the same from any convenient river, creek or stream "of running water. * * *

Act 86 of the 17th Legislature, under which this appropriation was alleged to have been made, further provides:

"SEC. 1. That any person shall have the right to appropriate any "of the unappropriated waters, or the surplus or flood waters in "this Territory for domestic, stock and other beneficial purposes, and "such person for the purpose of making such appropriation shall "have the right to construct and maintain reservoirs, ditches and "all other necessary waterways, and the person first appropriating "waters for such purposes shall always have the better right to the "same.

"SEC. 2. Every person who shall desire to appropriate any of the "waters of this Territory for the uses and purposes mentioned in "section one of this act, shall first post at the place of diversion, on "the stream or streams as the case may be, a notice of his appropria- "tion. * * *

The determination of this case depends upon whether the water

developed and used by the cross-complainant, and claimed to have been appropriated by him, constituted a running stream flowing in natural channels between well defined banks, such as is contemplated by the provisions of our statutes as cited herein, and therefore the subject of appropriation, or whether it was on the contrary, filtrating or percolating water oozing through the soil beneath the surface in undefined and unknown channels, and therefore a component part of the earth, having no characteristic of ownership distinct from the land itself, and therefore not the subject of appropriation by another, but belonging to the owner of the soil.

129 Throughout the Pacific coast where the doctrine of appropriation obtains, the decisions are uniform to the effect that waters percolating generally through the soil beneath the surface are the property of the owner of the soil, but that subterranean streams, flowing in natural channels, between well defined banks, are subject to appropriation under the same rule as surface streams. The law on this subject has been correctly stated by the appellant in his brief:

"No distinction exists between waters running under the surface "in defined channels and those running in distinct channels upon "the surface. The distinction is made between all waters running "in distinct channels, whether upon the surface or subterranean, "and those oozing or percolating through the soil in varying quan-"tities and uncertain directions."

Strait *vs* Brown, 16 Nev. 317.

He claims, however, that the evidence was clear and conclusive that the water in question was "a subterranean stream, with well defined channel and banks" and that "the court erred in finding that the water in question was not a flowing stream with well defined channel or banks."

This presents solely a question of fact, both parties agreeing as to the law in the premises. The defendant having alleged in the cross-complaint that there was a subterranean stream of water running in a well defined channel, the burden of proof was upon him to establish that fact by competent evidence. In such cases the rule invariably followed by appellate tribunals is that unless the

130 evidence was such as to prove clearly and conclusively the fact for which it was offered, the finding of the trial court against the establishment of such fact will not be disturbed on appeal. We have examined the evidence in this case and do not see how the court could have found from the evidence in the case other than it did. We fail to find sufficient evidence in the testimony of the witnesses of the appellant to establish the existence of "a subterranean stream with well defined channel or banks" even if no consideration were given to the contradictory evidence introduced by the opposite party.

We find nothing in the record to justify the reversal of the decision of the lower court or to necessitate a retrial of the case. Our

attention has been called to the allowance of interest by the lower court at the rate of seven per cent. per annum upon the judgment. This was clearly error. The legal rate of interest for judgments under the Revised Statutes of 1901, which were in force at that time, was six per cent. per annum. The judgment will be modified to that effect.

The case will be remanded to the lower court with the direction to enter the judgment bearing interest at the rate of six per cent. per annum, as indicated herein.

FLETCHER M. DOAN,
Associate Justice.

We concur:

EDWARD KENT, *C. J.*
GEO. R. DAVIS, *A. J.*

131 (Endorsed:) # 802. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Opinion. Filed March 26, 1904. S. M. Cullom, clerk.

132 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.
} No. 802. Motion for Re-hearing.

Appeal from the district court of Coconino county—Hon. Richard E. Sloan, judge.

Now comes the appellant C. E. Howard in the above styled and numbered cause and moves the court to set aside the judgment heretofore rendered in this cause affirming the judgment of the court below, for the following reasons, to-wit:

First. Because the court erred in rendering judgment affirming the decision of the lower court in this: That it was held and decided by the above entitled court as follows:

"The determination of this case depends upon whether the water developed and used by the cross-complainant and claimed to have been appropriated by him, constituted a running stream flowing in natural channels between well defined banks, such as is contemplated by the provisions of our statutes as cited herein, and therefore the subject of appropriation, or whether it was on the contrary,

133 filtrating or percolating water oozing through the soil beneath the surface in undefined and unknown channels, and therefore a component part of the earth, having no characteristic of ownership distinct from the land itself, and therefore not the subject of appropriation by another, but belonging to the owner of the soil.

That is to say, in your answer to that question you will state
106 what the rental value of the premises in dispute was as you find it each year beginning with the year 1897. These are the interrogatories which are submitted to you. Now, under the statutes, all of these questions do not require unanimity at the hands of the jury. That is to say, questions number one, number two, number three, number four, number five, number six and number seven may be answered by three-fourths of the jury. If nine of you concur in an answer to any of these questions, to wit: numbers, 1, 2, 3, 4, 5, 6 and 7, that will constitute a sufficient answer to the questions and you will give the answer whatever it may be as determined by three-fourths verdict, and unless all of you concur in such answer this answer will be signed by the nine or ten or eleven of you as the case may be, who agree upon that answer. Of course, if all of you agree to any answer to any of these questions, it will only be necessary to sign the answer by your foreman. But when it comes to questions eight and nine I charge you that in order to answer these questions so as to constitute a verdict in this case, it will be necessary for all of you to agree upon that answer. Hence the answer to questions eight and nine, whatever that may be, will be signed when agreed upon by all of you simply by your foreman.

By the COURT: Have you any argument to make to the jury?

Case argued by attorneys.

By the COURT: The jury will take the interrogatories under the instructions. Swear an officer.

107 Thereafter upon the same day the jury returned into court the following verdict and answers to the questions submitted to them under the direction of the court:

(Title of the Court and Cause.)

Question No. 1. Did the defendant's grantor go upon the land in question when it was unoccupied and unsurveyed?

Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 2. Was there a subterranean stream flowing in well defined channel upon said premises about the year 1889?

Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 3. Did defendant's grantor, about the year 1889, 1890, by means of sinking a shaft and running tunnels therefrom intercept the flow of such underground stream of water?

Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 4. If you have found that there was an underground stream of water upon the premises in question on or about the year

1889, did defendant's grantor divert the same and apply it to a beneficial use, to wit: for stock purposes?
Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 5. If you have found that there was a subterranean stream upon the premises in question, was defendant's grantor the first person to divert and apply such water to a beneficial use?
Answer. Yes.

S. S. ACKER, *Foreman.*

108 Question No. 6. If you have found that there was a subterranean stream of water upon said premises, did defendant's grantor intercept the same by means of a shaft and tunnel and convey the same by means of a pipe line to water troughs and a reservoir?
Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 7. Has the defendant and his grantor from about the year 1889 down to the time of bringing this suit been in the open, notorious, uninterrupted and peaceable possession, with the knowledge of the plaintiff, of the land and the shaft and tunnel and pipe leading therefrom and reservoir connected therewith, and using the water flowing therefrom for stock purposes?
Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 8. Had the premises in question any annual rental value since February 2nd, 1897?
Answer. Yes.

S. S. ACKER, *Foreman.*

Question No. 9. If in answer to last question you have found that the premises in question did have a rental value, state what such rental value was year by year since February 2nd, 1897?
Answer.

Feb. 2, 1897 to Feb. 2, 1898	$240.00
Feb. 2, 1898 to Feb. 2, 1899	140.00
Feb. 2, 1899 to Feb. 2, 1900	140.00
Feb. 2, 1900 to Feb. 2, 1901	100.00
Feb. 2, 1901 to Sep. 26, 1901	64.66

S. S. ACKER, *Foreman.*

109 That thereafter on the first day of May, 1902, the same being a day of the regular September 1901 term of said court, the court filed its findings of facts and decree in said cause which is in words as follows:

(Title of the Court and Cause.)

This cause having come on to be heard this 26th day of September, A. D. 1901, upon the plaintiff's amended complaint and amended demurrer and answer to defendant's cross-complaint, and upon the defendant's amended answer and cross-complaint; and the evidence both oral and documentary introduced by the respective parties; and a jury having been duly empaneled and sworn, to whom were submitted interrogatories, and they having on September 26th, 1901, returned into court with their answers thereto; and it being found by said jury that the rental value of the land mentioned and described in plaintiff's complaint and hereinafter described was from the 2nd day of February, 1897 to the 2nd day of February, 1898, of the value of $240.00; and from the 2nd day of February, 1898, to the 2nd day of February, 1899, of the value of $140.00; from the 2nd day of February, 1899, to the 2nd day of February, 1900, was $100.00; and from the 2nd day of February, 1900, to the 2nd day of February, 1901, was $140.00; and from the 2nd day of February, 1901 to the 26th day of September, 1901, was $64.66. And the court being fully advised in the premises makes the following

Findings of Facts.

I.

That plaintiff is the owner of the hereinafter described
110 tract of land, and that the said land was prior to the entry thereof of either the defendant and cross plaintiff or his grantors, the property of the plaintiff and his grantors, and not public lands of the United States.

II.

That the improvements claimed by defendant and cross plaintiff are all situate in and upon said tract of land.

III.

That the defendant and cross plaintiff and his grantors have only used the water mentioned and described in defendant's cross complaint, upon said land.

IV.

That the water thereon is not the water of a running stream with definite channel and banks.

Conclusions of Law.

Wherefore:

I.

The court finds that the plaintiff is the owner of and entitled to the immediate possession of, the said hereinafter described land, together with the improvements and water thereon, and that a writ of restitution should be issued out of this court in his favor for the possession thereof.

II.

That defendant and cross plaintiff was a trespasser upon said land, and has no right to the improvements thereon.

III.

That neither the defendant and cross plaintiff nor his
111 grantors have ever made any valid appropriation of the water upon said land.

IV.

That plaintiff should have and recover from the defendant the sum of six hundred, eighty four and 66 / 100 dollars, as the rental value of said land to and until the 26th day of September, 1901, together with interest thereon at the rate of seven per cent. per annum from said date.

Wherefore, it is ordered, adjudged and decreed:

First. That the plaintiff is the owner of and entitled to the immediate possession and exclusive possession, of that certain tract of land situated in the county of Coconino, Territory of Arizona, to wit: the northwest quarter of section fifteen, in township twenty five, north, of range three west, of the Gila and Salt River base and meridian, together with all and singular the water and improvements thereon; and that a writ of restitution should issue out of this court in his favor for the possession thereof, and that thereunder he be placed in the immediate possession thereof.

Second. That plaintiff have and recover from the defendant said sum of six hundred, eighty four and 66 / 100 dollars, together with interest thereon at the rate of seven per cent. per annum from the 26th day of September, A. D. 1901, and his costs herein taxed at $124.10; and that he have execution therefor.

112 Third. That defendant and cross plaintiff's cross complaint and amended cross complaint, be and the same is hereby, dismissed.

Done by the court, in open court, this 1st day of May, A. D. 1902.

RICHARD E. SLOAN, *Judge.*

That thereafter on the 3rd day of May, the same being a day of the regular September 1901 term of said court, and within five (5) days after rendition of the judgment in said cause, the defendant filed his motion for a new trial in said cause, of which the following is a copy:

(Title of the Court and Cause.)

Comes now the defendant in the above entitled cause and moves the court to set aside the judgment herein and to grant new trial, and for grounds therefor says:

1. The court at the trial erred in admitting evidence over the objections of the defendant.
2. The court at the trial erred in rejecting evidence offered by the defendant.
3. The evidence at the trial does not sustain the judgment of the court.
4. The court erred in over-ruling the defendant's motion for judgment.
5. The court below erred in disallowing the value of improvements against the damages allowed the plaintiff.
6. The court at the trial erred in refusing to submit cer-
113 tain questions of fact asked to be submitted by the defendant.
7. The court at the trial erred in his charge to the jury.
8. The decision of the court is contrary to the law of the land.

Wherefore defendant prays that the judgment of the court may be set aside and defendant granted a new trial of said action.

E. E. ELLINWOOD AND
W. C. CAMPBELL,
Attorneys for Defendant.

And thereafter, to wit: on the 12th day of June, 1902, the same being a day of said September 1901 term of said court, said motion for a new trial came up to be heard and the court being sufficiently advised in the premises, did overrule said motion for a new trial, to which ruling of the court the defendant then and there excepted.

Wherefore the defendant prays that this, his bill of exceptions, containing all the evidence in said case may be settled, allowed, signed and made a part of the record in this cause.

E. E. ELLINWOOD,
W. C. CAMPBELL,
Attorneys for Defendant.

114 The foregoing bill of exceptions containing all the evidence and all the facts given in evidence on the trial of said cause was duly and legally presented to me by counsel for the defendant within the time and in the manner prescribed by law, and

was by me afterwards submitted to counsel for plaintiff, and being found correct is now afterwards on this 12th day of June, 1902, and within ten (10) days after the term at which said cause was tried, settled, allowed, signed, ordered, filed and made a part of the record of this cause.

RICHARD E. SLOAN,
Judge of the 4th Judicial District, Territory of Arizona, in and for the County of Coconino.

The foregoing bill of exceptions containing all the evidence and all the facts given in evidence on the trial of said cause, having been presented to us and having been examined, is found to be correct this 12th day of June, 1902.

HENRY F. ASHURST,
EDWARD M. DOE,
Attorneys for Plaintiff.

115 In the District Court of the Fourth Judicial District in the Territory of Arizona in and for the County of Coconino.

E. B. PERRIN, Plaintiff,
vs.
C. E. HOWARD, Defendant.

Whereas in the above entitled cause pending in the district court of the fourth judicial district of the Territory of Arizona, in and for the county of Coconino, at a regular term of said court on the first day of May, A. D. 1902, E. B. Perrin, plaintiff, obtained a decree ordering, adjudging and decreeing that the plaintiff is the owner of and entitled to the immediate possession and exclusive possession of that certain tract of land situated in the county of Coconino, Territory of Arizona, to wit: the north west quarter of section 15 in township 25 north of range 3 west of Gila and Salt River base and meridian, together with all and singular the water and improvements thereon, and that a writ of restitution should issue out of said court in favor of plaintiff for the possession thereof.

That plaintiff should have and recover from and of the defendant the sum of six hundred eighty four and 66/100 dol-
116 lars ($684.66), together with interest thereon at the rate of seven per cent. (7 %) per annum from the 26th day of September, 1901. And it was further decreed that the plaintiff do have and recover of the defendant his costs in said action taxed at $124 10/100, from which judgment and decree C. E. Howard, defendant, has taken an appeal to the supreme court of the Territory of Arizona.

Now therefore, we, the said C. E. Howard, as principal and T. A. Riordan and M. J. Riordan as sureties, acknowledge ourselves bound to pay the said E. B. Perrin, plaintiff, the sum of two thou-

That in the month of April, 1894, said land was surveyed under the direction of the surveyor general of the United States, and the lands in controversy herein were thereby found to be the N. W. ¼ of sec. 15, township 25 N. R. 3 west, Gila & Salt River meridian.

That said survey was duly and regularly accepted and approved by the United States surveyor general on the 13th day of July, 1895, and duly accepted and approved by the Commissioner of the General Land Office and triplicate plats of the lands embraced in said survey by him ordered filed in the local land office at Prescott, Arizona. That said plat was so filed and that thereafter, on the 27th day of June, 1896, the said tract of land, together with others, was duly and regularly selected by the said Atlantic & Pacific Railroad Company as a portion of the lands to which it was entitled under the said act of Congress. That on the 27th day of July, 1896, the filing of said list was allowed by the register and receiver of the United States land office at Prescott, Arizona, and by them approved and the said land by them certified to be surveyed public land
145 of the United States, and within the forty miles of granted land limits on each side of said railroad. That neither the same nor any part thereof had been returned and denominated as mineral lands or land, nor claimed as swamp land, and that there were no homestead, preëmption, State or other valid claim to any portion of said land on file or record in the said land office, and that the cost of the survey and all fees allowed by law had been paid. That thereupon the said list of selections as aforesaid was by said register and receiver forwarded to and filed with the Secretary of the Interior and Commissioner of the General Land Office and has since remained and now remains on file in said office.

That the said land is part of an odd numbered section situate within the forty mile limits of said grant, that it is non-mineral in character, that it is neither swamp land nor claimed as such, that it is not within any reservation, that it is not State or territorial land, that no homestead or pre-emption, State nor other valid claim to any portion of said land has been filed or is of record in the United States land office in the district in which said land is situated.

That on the said 27th day of June, 1896, the said Atlantic & Pacific Railroad Company paid the costs of said survey as required by law, and on said day paid to the register and receiver of the United States land office at Prescott, Arizona, all fees, costs and charges allowed them by law.

That the Atlantic & Pacific Railroad Company, by its war-
146 ranty deed, under date of January 13th, 1897, duly executed and acknowledged, conveyed said land to Edward B. Perrin, the appellee.

That prior to the commencement of this suit no patent had issued for said land.

That the only water upon said land is percolating water oozing through the soil beneath the surface in an undefined and unknown channel. That in the year 1889 the said land was unoccupied and

unimproved. That during said year one J. W. Abshire, appellant's grantor, entered upon and took possession of said land and erected valuable improvements thereon and by sinking a well and running tunnels therefrom collected the water in and under an arroyo and conveyed the same by pipes to troughs and a reservoir placed on said land and used said water for the watering of stock.

That thereafter, in the year 1892, said C. E. Howard, appellant, for a valuable consideration received from said J. W. Abshire a quit claim deed for said unsurveyed land and the improvements and water thereon, which said quit claim deed was thereafter and on the 16th day of June, 1902, duly acknowledged before a notary public, so as to entitled it to be recorded.

That the appellant herein, on the 16th of July, 1895, posted on the dwelling house on the premises a notice in accordance with act 86 of the seventeenth legislature (Laws 1893, p. 135), that he had appropriated all the water in a certain defined underground
147 channel of water, and to that end had made certain cross-cuts, a tunnel, and a well, also a certain ditch, pipe line, and reservoir, all located at a place known as the "Abshire place," held by him as a possessory right on unsurveyed land of the United States, and recorded a copy of said notice on said dat in the public records of Coconino county, at page 63, in Book 1 of Millsites and Water Rights.

That said appellant and his said grantor as aforesaid have been in the exclusive, open and notorious possession, with the knowledge of appellee, of said land, improvements and water ever since the year 1889, claiming by right of possession only, and have used the water on said land for the watering of stock thereon.

That neither the said C. E. Howard, appellant, nor his said grantor have ever diverted any of said water from said land or used or caused the same to be used elsewhere by any person whomsoever.

Done in open court this 6th day of May, A. D. 1904.

FLETCHER M. DOAN,
Associate Justice of the Supreme Court of Arizona Territory.

(Endorsed:) No. 802. In the supreme court of the Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Statement of facts. Filed August 25, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

148 In the Supreme Court of the United States.

C. E. Howard, Appellant,
vs.
E. B. Perrin, Appellee.
} Assignment of Errors.

Comes now the said appellant in the above entitled cause and says that there is manifest error in the record and proceedings in said cause, and does hereby note, specify and assign the same as follows:

I.

That said district court and said supreme court in affirming the same, erred in admitting in evidence the certified copy, under the seal of the Commissioner of the Land Office, of the record pertaining to the selection of lands by the Atlantic & Pacific Railroad Company, and marked "Exhibit B" and which was in words and figures as follows:

"EXHIBIT B."

(4–207a.)

F.
C. S. B.

DEPARTMENT OF THE INTERIOR, S. S. A.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 21, 1901.

I, Binger Herman, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy so far as per-
149 tains to township 25 north ranges 3 and 4 west, Arizona, of a list filed in the local land office at Prescott, Arizona, June 30, 1896, is a true and literal exemplification from the original list now on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

BINGER HERMAN,
Commissioner of General Land Office.

List of Lands in the Land District Selected by Atlantic and Pacific Railroad Company.

The undersigned, the duly authorized general agent of the land department of the Atlantic and Pacific Railroad Company, under and by virtue of the acts of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866," and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, and contained in a circular dated January 24th, 1867, hereby makes and files the following list of selections of public lands claimed by the said Atlantic and Pacific Railroad Company as enu-ing to it and to which it is entitled, under and by virtue of the grant and-provisions of the said acts of Congress, and the location of the
150 line of route of said railroad and telegraph line of said Atlantic and Pacific Railroad Company, being for a section of one hundred miles of said road: Commencing at a point near the town of Isleta, in the county of Bernalillo, Territory of Mexico,

coterminous with the 14, 15, 16, 17 and 18 sections of said road, which said section of road and telegraph line has been duly accepted by the President of the United States, as provided in the aforesaid acts of Congress.

C. H. FANCHER,
General Agent of the Land Department.

The selections being particularly described as follows:

A. M. S. 4–298.

North of base line and west of Gila and Salt River principal meridian.

Atlantic & Pacific Railroad List of Selections Made at United States Land Office at Prescott, Arizona.

No.	Parts of sec.	Section.	Township.	Range.	Acres.	Remarks.
* *	* * *	* * *	* * *			
	All of.....	15	25	3	640.00	

(Further description of other lands selected is here omitted by consent of counsel as being immaterial to the issues in said cause.)

151 CHICAGO, *Nov.* 6, 1894.

Hon. C. N. Sterry, gen. att'y A. & P. R. R., Albuquerque, N. M.

DEAR SIR: The land commissioner of the Atlantic & Pacific Railroad Company has resigned, and his resignation has been accepted.

Under existing circumstances, the receivers deem it inexpedient to definitely fill the vacancy at present. They therefore request you to take charge of the office temporarily under the title of acting land commissioner. The books and papers are being moved to Albuquerque.

Very truly yours,

ALDACE F. WALKER,
JOHN J. McCOOK,
J. C. WILSON, *Receivers.*

I hereby certify that the foregoing is a true and literal copy of the original.

EARL A. SNYDER,
Notary Public.

My commission expires Nov. 26, 1898.

152 Atlantic & Pacific railroad.

C. W. Smith, receiver; C. H. Fancher, general agent; C. N. Sterry, acting land commissioner.

Land department.

June 26, 1896.

ALBUQUERQUE, N. M., *June* 26, 1896.

Mr. C. H. Fancher, general agent, land dep't, A. & P. R. R. Co., Albuquerque, N. M.

DEAR SIR: You are hereby authorized to file with the register and receiver of the U. S. land office, at Prescott, Arizona, list of selections of lands No. 16 for lands within the grant limits to this company, in Arizona.

C. N. STERRY,
Acting Land Commissioner A. & P. R. R. Co.

TERRITORY OF NEW MEXICO, } ss:
County of Bernardino, }

I, C. H. Fancher, being duly sworn, depose and say: that I am the general agent of the land department of the Atlantic and Pacific Railroad Company. Th the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Atlantic and Pacific Railroad Company, for which
153 a grant of land was made by the acts of Congress, entitled "An act granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean, approved July 27th, 1866." That the said lands are vacant, unappropriated and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant, lying within the limits of forty miles on each side of the line of route of said road, being for a section of one hundred miles of said road: Commencing at a point near the town of Isleta, in the county of Bernalillo, Territory of New Mexico, coterminous with the 14, 15, 16, 17 and 18 sections of said road, which said section of road and telegraph line has been duly accepted by the President of the United States, as provided in the aforesaid acts of Congress.

C. H. FANCHER.

Subscribed and sworn to before me this twenty-seventh day o June, A. D. 1896.

EARL A. SNYDER,
Notary Public.

[SEAL.]

We hereby certify that we have carefully and critically examined the foregoing list of the lands claimed by the Atlantic and Pacific Railroad Company, under the grant to said Atlantic and Pacific Railroad Company by the acts of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph
154 line from the States of Missouri and Arkansas to the Pacific ocean, approved July 27th, 1866" and selected by C. H. Fancher, the duly authorized general agent of the land department of the said Atlantic and Pacific Railroad Company; and we have tested the accuracy of said list by the plats and records in this office, and we find the same to be correct; and we further certify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the forty miles of granted limits on each side, and that the same are not nor is any part thereof, returned and dominated as mineral lands or land nor claimed as swamp land, neither are there any homesteads, pre-emptions, State, nor other valid claim to any portion of said lands on file or record in this office. We further certify that the foregoing list shows *a* assessment of the fees payable to us, allowed by the act of Congress, "approved July 1st, 1864," and contemplated by the instructions dated January 24th, 1867, and addressed by the Commissioners of the General Land Office to the registers and receivers of United States land offices, and that the said Atlantic and Pacific Railroad Company has paid to the undersigned, the receiver, the full sum of one thousand, three hundred and forty ($1340) dollars, in full payment and discharge of said fees.

H. D. ROSS,
Register of the United States Land Of.
JAKE MARKS,
Receiver of the United States Land Office.

155 Noted in Selection Docket page 10."

for the reason that the same was incompetent, irrelevant and immaterial and not the best evidence. That the purported correspondence attached to said "Exhibit B" and certified to by the Commissioner, could not be made competent evidence by virtue of the certificate of the Secretary of the Interior or any subordinate official. That which is incompetent evidence in the first instance and before the purported letters were certified to, cannot be made evidence by virtue of a certificate.

II.

That said district court and said supreme court in affirming the same, erred in overruling appellant's motion for a nonsuit for the reason that it nowhere appears in the record by any competent testimony, that the land in question was not land excepted by the terms of the grant to the Atlantic & Pacific Railroad Company under the act of Congress dated July 27th, 1866.

III.

The said district court and the supreme court in affirming the same, erred in not holding that appellee's said cause of action was barred by limitation under and by virtue of par. 2941 Revised Statutes Arizona 1901, for the reason that the complaint of the appellee was filed on the 13th day of July, 1898, and the appellant in his said answer alleged that he occupied and was in pos-
156 session of and claimed the real property described in said appellee's complaint by right of possession only, and that he had had open, peaceable, adverse and continuous possession of said premises by right of possession only for a period of more than two years immediately prior to the bringing of said action and for more than two years after appellee's right of action accrued, and that the same was fully barred by the statute of limitations; which said plea was abundantly sustained by the uncontradicted testimony in the case.

IV.

That the court erred in denying and overruling defendant's motion for a new trial of said cause, for each and all of the reasons hereinabove assigned, and for the further reason that the judgment and decree of the court is not supported or sustained by the evidence. That is to say:

1. It is nowhere found in the record established by any competent testimony that the appellee has any legal or equitable title to said land in question in that it is not shown by competent testimony that the land in question was not of lands excepted by the terms of the grant to the Atlantic & Pacific Railroad Company. The evidence discloses that no patent to said lands has been issued by the United States to the Atlantic & Pacific Railroad Company, and does not disclose by competent testimony in the record that the land in question was of the character called for by the act of Congress of July 27th, 1866;
157 nor that a selection of the same was made by the railroad company, nor that the selection of the same as made by said Atlantic & Pacific Railroad Company was approved by the Secretary of the Interior or the Commissioner of the General Land Office; nor that anything was done and performed in relation to said lands which would bind the United States and which would make the issuance of a patent thereto follow as a mere ministerial act. That plaintiff and appellee has failed to connect his title with that of the United States or to show any title in himself.

V.

That said supreme court erred in deciding and holding that filtrating or percolating water oozing through the soil beneath the surface in undefined channels, has no characteristics of ownership

distinct from the land itself and is not subject to appropriation by another but belongs to the owner of the soil, for the reason that since the common law rule that the owner of land was the absolute owner of percolating water beneath the surface of his land, could not be fully applied to the Territory of Arizona by reason of its peculiar physical conditions, such common law rule was not adopted in the Territory of Arizona as a part of the English common law, and waters percolating through the soil beneath the surface are subject to appropriation, and the appropriation of said waters upon the land in question by the appellant, although said waters
158 be found to be percolating water, was a good and valid appropriation thereof in law.

Wherefore, by reason of the premises aforesaid, this appellant prays that said judgment and decree be reversed, be vacated and be for naught held.

May 6th, 1904.

EVERETT & ELLINWOOD,
Attorney- for Appellant.

(Endorsed :) No. 802. In the supreme court of the Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Assignment of errors. Filed this 25 day of August, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

159 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.

Know all men by these presents that we, C. E. Howard, of Coconino county, Arizona, as principal, and M. J. Riordan and F. W. Sisson, of Flagstaff, Coconino county, Arizona, as sureties, are held and firmly bound unto the said E. B. Perrin in the penal sum of ten thousand dollars, lawful money of the United States, to be paid to him, the said obligee herein ; for the payment of which well and truly to be made we bind ourselves and each of us jointly and severally by these presents.

Sealed with our seals and dated this 29th day of August, 1904.

Whereas the above named principal has prosecuted an appeal to the Supreme Court of the United States—the same having been duly and properly allowed—from a final judgment rendered against him and in favor of said obligee herein in the supreme court of the Territory of Arizona, to reverse the judgment rendered in said court:

Now, therefore, the condition of this obligation is such that if the above named principal and obligor herein shall prosecute
160 his said appeal with effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall

be void; otherwise the same shall be and remain in full force and virtue.

C. E. HOWARD. [SEAL.]
M. J. RIORDAN. [SEAL.]
F. W. SISSON. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

M. J. Riordan and F. W. Sisson, each being of the county of Coconino, in said Territory, being by me first duly sworn on their several oaths, do say and each for himself, that they are sureties in the above and foregoing bond, and that after paying his just debts and obligations he is worth twenty thousand dollars in real and personal property within the jurisdiction of said court and subject to execution and levy, and that the same is not exempt from execution.

M. J. RIORDAN.
F. W. SISSON.

Subscribed and sworn to before me this 29" day of August, 1904.

JAMES L. BYRNES,
Notary Public.

[SEAL.]

My commission expires Jan. 19", 1906.

161 Approved by:
FLETCHER M. DOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 802. In the supreme court, Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Bond on appeal. Filed Sept. 17, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

162 *Minute Entries.*

In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit, the 31st day of October A. D., 1902, the same being one of the regular juridical days of the October term, A. D., 1902, of said court, the following order, *inter alia*, was had and entered of record in said court, which said order is in words and figures, as follows, to-wit:

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee. } No. 802.

It is ordered by the court that appellee herein have twenty days from this day in which to file brief, and

It is further ordered that appellant herein have ten days thereafter in which to file reply brief.

And afterwards and upon to-wit, the 13th day of January A. D., 1903, the same being one of the regular juridical days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

163 C. E. HOWARD, Appellant, *vs.* E. B. PERRIN, Appellee. } No. 802.

On motion of E. M. Doe, Esq., attorney for appellee herein, it is ordered that this cause be submitted on briefs.

And afterwards and upon, to-wit, the 26th day of March, A. D. 1904, the same being one of the regular juridical days of the January term A. D., 1904, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

C. E. HOWARD, Appellant, *vs.* E. B. PERRIN, Appellee. } No. 802.

This cause having been heretofore submitted, and by the court taken under consideration, and the court having considered the same and being fully advised in the premises:

It is ordered that this cause be and the same is hereby remanded to the lower court with direction to enter the judgment bearing interest at the rate of six per cent. (6%) per annum, and in all other respects the judgment of the lower court is hereby affirmed.

164 It is further ordered, adjudged and decreed, that E. B. Perrin, appellee herein, do have and recover of and from C. E. Howard, appellant herein, and T. A. Riordan and M. J. Riordan, sureties on supersedeas bond herein, the sum of six hundred eighty-four and 66/100 ($684.66) dollars, with interest thereon at the rate of six (6%) per cent. per annum from the 26th day of September, A. D., 1901, together with his costs in this court taxed at twenty-four and 75/100 ($24.75) dollars, and his costs in the court below, taxed at one hundred twenty-four and 10/100 ($124.10) dollars, and that he have execution therefor.

And afterwards and upon to-wit, the 6th day of May A. D. 1904, the same being one of the regular juridical days of the January term A. D., 1904, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

"Throughout the Pacific coast where the doctrine of appropriation obtains, the decisions are uniform to the effect that waters percolating generally through the soil beneath the surface are the property of the owner of the soil."

Whereas, since the common law rule that an owner of land was the absolute owner of percolating waters beneath the surface of his land could not be fully applied to the Territory of Arizona by reason of its peculiar physical conditions, such common law rule was not adopted in the Territory of Arizona as a part of the English common law, and waters percolating through the soil beneath the surface are subject to appropriation, and the appropriation of said waters by the appellant, although said waters be found to be percolating waters, was a good and valid appropriation thereof in law. (Katz *et al. vs.* Walkenshaw, 74 Pac., 766.)

Appellant represents that Edward M. Doe, who resides at Flagstaff, Coconino county, is the attorney of record of the appellee.

Wherefore, appellant prays that on the hearing hereof the judgment affirming the cause heretofore rendered herein be set aside and a re-hearing granted, and that further proceedings be had
134 herein as prayed for in appellant's original brief.

E. E. ELLINWOOD,
Attorney for C. E. Howard, Appellant.

Service of the above and foregoing motion by copy is hereby acknowledged this first day of April, 1904.

EDWARD M. DOE,
Attorney for E. B. Perrin, Appellee.

(Endorsed:) No. 802. In the supreme court, Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin appellee. Motion for rehearing. Filed April 2, 1904, S. M. Cullom, clerk.

135 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.

J. A. Pitts, being duly sworn, on his oath says: That he is acquainted with the matter in dispute in the above entitled cause, and is also well acquainted with the property involved in said suit and with its value. That the value of said property, exclusive of costs, exceeds the sum of $5,000. That all of said property, to-wit: the north west quarter of section 15, township 25 north, range 3 west, in Coconino county, Arizona, the buildings and improvements thereon, and the water and water-rights thereupon and flowing there through, is involved in said suit and the issue between the said appellant and the said appellee is as to which of the two has the first

right thereto; and that affiant on his oath says that the matter in dispute in this action, exclusive of costs, exceeds the sum of $5,000.

J. A. PITTS.

Subscribed and sworn to before me this 7th day of June 1904.

E. E. ELLINWOOD,
[SEAL.] *Notary Public.*

My commission expires Oct. 8, 1905.

136 (Endorsed:) No. 802. In the supreme court of the Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Affidavit of J. A. Pitts as to value of property involved in suit. Filed this 25 day of August, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

137 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.

Charles E. Howard, being duly sworn, on his oath says: That he is the appellant in the above entitled action, that he is acquainted with the matter in dispute in the above entitled cause and is also well acquainted with the property involved in said suit and with its value. That the value of said property, exclusive of costs, exceeds the sum of $5,000.00. That all of said property, to wit: the northwest ¼ of section 15, township 25 north range 3 west, in Coconino county, Arizona, the buildings and improvements thereon, and the water and water-rights thereupon and flowing there through, is involved in said suit and the issue between the said appellant and the said appellee is as to which of the two has the first right thereto; and that affiant on his oath says that the matter in dispute in this action, exclusive of costs, exceeds the sum of $5,000.00.

C. E. HOWARD.

Subscribed and sworn to before me this 8th day of June, 1904.

H. PYLE,
[SEAL.] *Notary Public.*

My commission expires Oct. 23rd, 1904.

138 (Endorsed:) No. 802. In the supreme court of the Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Affidavit of C. E. Howard as to value of property involved in suit. Filed this 25 day of August, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

139 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.

M. J. Riordan, being duly sworn, on his oath says: That he is acquainted with the matter in dispute in the above entitled cause and is also well acquainted with the property involved in said suit and with its value. That the value of said property, exclusive of costs, exceeds the sum of $5,000.00. That all of said property, to-wit: the northwest ¼ of section 15, township 25 north range 3 west, in Coconino county, Arizona, the buildings and improvements thereon, and the water and water-rights thereupon and flowing there through, is involved in said suit and the issue between the said appellant and the said appellee is as to which of the two has the first right thereto; and that affiant on his oath says that the matter in dispute in this action, exclusive of costs, exceeds the sum of $5,000.00.

M. J. RIORDAN.

Subscribed and sworn to before me this 6″ day of June, 1904.

JAMES L. BYRNES,
[SEAL.] *Notary Public.*

My commission expires Jan. 19″, 1906.

140 (Endorsed:) No. 802. In the supreme court of the Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Affidavit of M. J. Riordan as to value of property involved in suit. Filed this 25 day of August, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

141 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.

Application of the Above Named Appellant for an Appeal.

The above named appellant, conceiving himself aggrieved by the final judgment entered on the 26th day of March, 1904, in the above entitled action and court against him, the said appellant, and in favor of said appellee, does hereby appeal therefrom to the Supreme Court of the United States, and said appellant hereby prays that his said appeal be allowed, and that a citation be duly signed and is-

sued, and that a transcript of the record, proceedings, opinion, judgment, and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

E. E. ELLINWOOD,
Attorney for said Appellant.

And now, to-wit, on the 6th day of May, 1904, the above application having been duly presented and considered, it is hereby ordered that the appeal above prayed for be allowed, and the
142 same is hereby allowed on filing a good and sufficient bond for costs in the sum of ten thousand dollars.

FLETCHER M. DOAN,
Associate Justice, Supreme Court of said Territory.

(Endorsed:) No. 802. In the supreme court, Territory of Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, appellee. Application for and allowance of an appeal. Filed August 25, 1904. S. M. Cullom, clerk. By Angie B. Parker, deputy.

143 In the Supreme Court of the Territory of Arizona.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee.
} Statement of Facts.

It is hereby ordered and adjudged that the facts in the above entitled case are found to be as follows, namely:

That the land mentioned and described in plaintiff's complaint and amended complaint herein is and at the commencement of this action was situate in the county of Coconino, Territory of Arizona; that said land is a part of the land granted to the Atlantic & Pacific Railroad Company, by act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the State of Missouri and Arkansas to the Pacific ocean, approved July 27th, 1886." That on the 22nd day of November, 1886, the said Atlantic & Pacific Railroad Company duly and regularly accepted the said grant and all the provisions and conditions of the said act. That a map of the definite location of said Atlantic & Pacific railroad through the Territory of Arizona was duly and regularly filed by said Atlantic & Pacific Railroad Company in the year 1872 with the Secretary of the Interior and the Commissioner of the General Land Office of the United States and was in said
144 year duly and regularly, by said officers, accepted and approved. That said railroad was completed in the year 1884 and was thereafter in said year duly accepted by the President of the United States upon the report of commissioners as provided by law.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee. } No. 802.

At this day, it is ordered that the motion for rehearing, herein by appellant, be and the same is hereby submitted.

165 And afterwards and upon to-wit, the 7th day of May, A 1904, the same being one of the regular juridical days of January term A. D., 1904, of said court, the following order, *alia*, was had and entered of record in said court in said cause, wh said order is in words and figures, as follows, to-wit:

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee. } No. 802.

It is ordered that the motion for re-hearing, filed herein by ap lant, and heretofore submitted, be and the same is hereby denie

And afterwards and upon to-wit the same day the following or order was had and entered of record in said court in said ca which said order is in words and figures, as follows, to-wit:—

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee. } No. 802.

Comes now E. E. Ellinwood, Esq., attorney for appellant her in open court, and gives notice of appeal from the judgm
166 of this court to the Supreme Court of the United States, moves the court that the appeal be allowed.

It is ordered by the court that said motion be granted and appeal be and the same is hereby allowed.

167 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, } *ss:*

I, Shelby M. Cullom, clerk of the supreme court of the Territ of Arizona, do hereby certify that the foregoing pages, numbe from 1 to 166, inclusive, contain a true and complete transcript the record and proceedings had in said court, in the case of C Howard, appellant, against E. B. Perrin, appellee, as the same main of record and on file in said office.

I further certify that the citation attached hereunto, is the o inal citation issued by said supreme court of the Territor Arizona.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme Seal Supreme Court of Arizona. court, at Phœnix, Arizona, this 27th day of September, 1904.

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

168 In the Supreme Court of the United States.

C. E. HOWARD, Appellant,
vs.
E. B. PERRIN, Appellee. } Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

To E. B. Perrin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, District of Columbia, within sixty days from the date hereof, pursuant to an appeal allowed by the Honorable Fletcher M. Doan, associate justice of the supreme court of the Territory of Arizona, on the 6th day of May, 1904, from a judgment rendered in the supreme court of the Territory of Arizona, on the 26th day of March, 1904, in an action on appeal to that court wherein you were appellee and C. E. Howard was appellant; to show cause, if any there be, why said judgment in your favor should not be set aside, reversed, corrected, and why speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of September, 1904.

FLETCHER M. DOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

169 TERRITORY OF ARIZONA, } *ss:*
County of Coconino, }

On this 20th day of September in the year of our Lord one thousand nine hundred and four, personally appeared Robert J. Walker, before me the subscriber, C. M. Funston clerk of the district court of the fourth judicial district of Arizona in and for Coconino county, and makes oath that he delivered a true copy of the within citation to E. B. Perrin the appellee herein, on the 20th of September, 1904 at Flagstaff, Coconino county, Arizona Territory.

ROBERT J. WALKER.

Sworn to and subscribed before me this 20th day of Sep
1904, at Flagstaff, Arizona.

[Seal Fourth Judicial District Court, Coconino Co., Arizona.]

C. M. FUNSTON,
Clerk of the Fourth Judicial District
Court, Coconino County, Ari

170 [Endorsed:] No. 802. In the supreme court Terri
Arizona. C. E. Howard, appellant, *vs.* E. B. Perrin, a
Citation on appeal. Filed Sept. 21, 1904 S. M. Cullom, cle
Endorsed on cover: File No. 19,495. Arizona Territo
preme court. Term No. 395. C. E. Howard, appellant, *vs.*
Perrin. Filed October 15", 1904. File No. 19,495.

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In The

Supreme Court of the United States

OCTOBER TERM, 1904.

No. ~~396~~ 110.

Office Supreme Court U.
FILED
MAY 22 1905
JAMES H. McKENNEY,
Clerk

C. E. HOWARD,

Appellant,

against

E. B. PERRIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA.

BRIEF FOR C. E. HOWARD, APPELLANT.

E. E. ELLINWOOD,
Attorney for Appellant.

C. M. FUNSTON, PRINTER, FLAGSTAFF, ARIZONA

In The

Supreme Court of the United States

OCTOBER TERM, 1904.

C. E. HOWARD,
Appellant,
AGAINST
E. B. PERRIN,
Appellee.

No. 395

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF ON BEHALF OF APPELLANT.

Statement.—The following is the statement of facts in the above entitled cause as found by the Supreme Court of the Territory of Arizona (Rec. pp. 77-79.)

"That the land mentioned and described in "plaintiff's complaint and amended complaint "herein is and at the commencement of this "action was situate in the County of Coconino, "Territory of Arizona; That said land is a "part of the land granted to the Atlantic & "Pacific Railroad Company, by Act of Con- "gress, entitled "An act granting lands to aid

"in the construction of a railroad and tele-
"graph line from the State of Missouri and
"Arkansas to the Pacific Ocean, approved
"July 27th, 1886." That on the 22nd day of
"November, 1886, the said Atlantic & Pacific
"Railroad Company duly and regularly ac-
"cepted the said grant and all the provisions
"and conditions of the said Act. That a map
"of the definite location of said Atlantic &
"Pacific Railroad through the Territory of
"Arizona was duly and regularly filed by said
"Atlantic & Pacific Railroad Company in the
"year 1872 with the Secretary of the Interior
"and the Commissioner of the General Land
"Office of the United States and was in said
"year duly and regularly, by said officers, ac-
"cepted and approved. That said railroad
"was completed in the year 1884 and was
"thereafter in said year duly accepted by the
"President of the United States upon the re-
"port of commissioners as provided by law.

"That in the month of April, 1894, said
"land was surveyed under the direction of the
"Surveyor General of the United States, and
"the lands in controversy herein were thereby
"found to be the N. W. ¼ of Sec. 15, Town-
"ship 25 N. R. 3 West, Gila & Salt River
"Meridian.

"That said survey was duly and regularly
"accepted and approved by the United States
"Surveyor General on the 13th day of July,
"1895, and duly accepted and approved by
"the Commissioner of the General Land Of-

"fice and triplicate plats of the lands em-
"braced in said survey by him ordered filed in
"the local land office at Prescott, Arizona.
"That said plat was so filed and that there-
"after, on the 27th day of June, 1896, the
"said tract of land, together with others, was
"duly and regularly selected by the said At-
"lantic & Pacific Railroad Company, as a por-
"tion of the lands to which it was entitled
"under the said Act of Congress. That on
"the 27th day of July, 1896, the filing of said
"list was allowed by the Register and Receiv-
"er of the United States Land Office at Pres-
"cott, Arizona, and by them approved and
"the said land by them certified to be sur-
"veyed public land of the United States, and
"within the forty miles of granted land limits
"on each side of said railroad. That neither
"the same nor any part thereof had been re-
"turned and denominated as mineral lands or
"land, nor claimed as swamp land, and that
"there were no homestead, pre-emption, State
"or other valid claim to any portion of said
"land on file or record in the said land office,
"and that the cost of the survey and all fees
"allowed by law had been paid. That there-
"upon the said list of selections as aforesaid
"was by said Register and Receiver forwarded
"to and filed with the Secretary of the Inte-
"rior and Commissioner of the General Land
"Office and has since remained and now re-
"mains on file in said office.

"That the said land is part of an odd num-

"bered section situate within the forty mile "limits of said grant, that it is non-mineral in "character, that it is neither swamp land nor "claimed as such, that it is not within any "reservation, that it is not State or Territorial "land, that no homestead or pre-emption, "State or other valid claim to any portion of "said land has been filed or is of record in the "United States Land Office in which said land "is situated.

"That on the said 27th day of June, 1896, "the said Atlantic & Pacific Railroad Com- "pany paid the costs of said survey as required "by law, and on said day paid to the Register "and Receiver of the United States Land Of- "fice at Prescott, Arizona, all fees, costs and "charges allowed them by law.

"That the Atlantic & Pacific Railroad Com- "pany, by its warranty deed, under date of "January 13th, 1897; duly executed and ac- "knowledged, conveyed said land to Edward "B. Perrin, the appellee.

"That prior to the commencement of this "suit no patent had issued for said land.

"That the only water upon said land is per- "colating water oozing through the soil be- "neath the surface in an undefined and un- "known channel. That in the year 1889 the "said land was unoccupied and unimproved. "That during said year one J. W. Abshire, "appellant's grantor, entered upon and took "possession of said land and erected valuable

"improvements thereon and by sinking a well "and running tunnels therefrom collected the "water in and under an arroyo and conveyed "the same by pipes to troughs and a reservoir "placed on said land and used said water for "the watering of stock.

"That thereafter, in the year 1892, said C. "E. Howard, appellant, for a valuable consid- "eration received from said J. W. Abshire a "quitclaim deed for said unsurveyed land and "the improvements and water thereon, which "said quitclaim deed was thereafter and on "the 16th day of June, 1902, duly acknow- "ledged before a Notary Public, so as to en- "title it to be recorded.

"That the appellant herein, on the 16th "day of July, 1895, posted on the dwelling "house on the premises a notice in accordance "with Act 86 of the Seventeenth Legislature "(Laws 1893, p. 135), that he had appropri- "ated all the water in a certain defined under- "ground channel of water, and to that end had "made certain cross-cuts, a tunnel and a well, "also a certain ditch, pipe line and a reser- "voir, all located at a place known as the " "Abshire Place," held by him as a possess- "ory right on unsurveyed land of the United "States, and recorded a copy of said notice "on said date in the public records of Coco- "nino County, at page 63, in Book 1 of Mill- "sites and Water Rights.

"That said appellant and his said grantor "as aforesaid have been in the exclusive, open

"and notorious possession, with the know-
"ledge of appellee, of said land, improvements
"and water ever since the year 1889, claiming
"by right of possession only, and have used
"the water on said land for watering of stock
"thereon.

"That neither the said C. E. Howard, ap-
"pellant, nor his said grantor have ever di-
"verted any of said water from said land or
"used or caused the same to be used else-
"where by any person whomsoever.

Specification of Errors.

The appellant has made five Assignments of Error (Rec. p. 79-85) as follows:

I.

That said District Court and said Supreme Court in affirming the same, erred in admitting in evidence the certified copy, under the seal of the Commissioner of the Land Office, of the record pertaining to the selection of lands by the Atlantic & Pacific Railroad Company, and marked "Exhibit B" and which was in words and figures as follows:

F. "EXHIBIT B." S. S. A.
C. S. B. (4-207 a)

Department of the Interior.
General Land Office.
Washington D. C., August 21, 1901,

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy so far as pertains to town-

ship 25 north ranges 3 and 4 west, Arizona, of a list filed in the local land office at Prescott, Arizona, June 30, 1896, is a true and literal exemplification from the original list now on file in this office.

In Testimony Whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(Seal) BINGER HERMANN,
Commissioner of General Land Office.

LIST OF LANDS IN LAND DISTRICT
Selected by
ATLANTIC & PACIFIC RAILROAD CO.

The undersigned, the duly authorized General Agent of the Land Department of the Atlantic and Pacific Railroad Company, under and by virtue of the Acts of Congress, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Ocean," approved July 27th, 1866, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, and contained in a circular dated January 24th, 1867, hereby makes and files the following list of selections of public lands claimed by the said Atlantic and Pacific Railroad Company as ensuing to it and to which it is entitled, under and by virtue of the grant and provisions of the said Acts of Congress, and the location of the line of route of said railroad and telegraph line of said

Atlantic and Pacific Railroad Company, being for a section of one hundred miles of said road: Commencing at a point near the town of Isleta, county of Bernallillo, Territory of New Mexico, coterminous with the 14, 15, 16, 17 and 18 sections of said road, which said section of road and telegraph line has been duly accepted by the President of the United States, as provided in the aforesaid Acts of Congress.

C. H. FANCHER,
General Agent of the Land Department.

The selections being particularly described as follows:

A. M. S. 4-298

North of base line and west of Gila and Salt river Principal Meridian.

Atlantic & Pacific Railroad list of selections made at United States Land Office at Prescott, Arizona.

No.	Parts of Sec.	Sec.	Towns'p	Range	Acres	Rem'ks
	All of	15	25	3	640	

(Further description of other lands selected is here omitted by consent of counsel as being immaterial to the issues in said cause.)

Chicago, Nov. 6, 1904.

Hon. C. N. Sterry,
Gen. Atty. A. & P. R. R.,
Albuquerque, N. M.

Dear Sir:—The Land Commissioner of the Atlantic & Pacific Railroad Company has resigned, and his resignation has been accepted.

Under existing circumstances, the Receivers deem it inexpedient to definitely fill the vacancy at present. They therefore request you to take charge of the office temporarily under the title of Acting Land Commissioner. The books and papers are being moved to Albuquerque.

Very truly yours,

ALDACE F. WALKER,
JOHN J. McCOOK,
J. C. WILSON,
Receivers.

I hereby certify that the foregoing is a true and literal copy of the original.

EARL A. SNYDER,
Notary Public.

My commission expires Nov. 26, 1898.

ATLANTIC & PACIFIC RAILROAD.

C. W. SMITH, Receiver.

C. N. STERRY,
Acting Land Com.

C. H. FANCHER,
General Agent.

LAND DEPARTMENT.

Albuquerque, N. M., June 26, 1896.

MR. C. H. FANCHER,
General Agent, Land Dep't.,
A. & P. R. R. Co.,
Albuquerque, N. M.

Dear Sir:—You are hereby authorized to file with the Register and Receiver of the U. S. Land Office, at Prescott, Arizona, List of Selec-

tions of Lands No. 16 for lands within the Grant Limits to this company, in Arizona.

C. N. STERRY,
Acting Land Com. A. & P. R. R. Co.

Territory of New Mexico, }
County of Bernallillo. } ss.

I, C. H. Fancher, being duly sworn, depose and say; That I am the General Agent of the Land Department of the Atlantic & Pacific Railroad company. That the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Atlantic and Pacific Railroad company, for which a grant of land was made by the Acts of Congress, entitled "An Act granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Ocean, approved July 27th, 1866," That the said lands are vacant, unappropriated and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant, lying within the limits of forty miles on each side of the line of route of said road, being for a section of one hundred miles of said road: Commencing at a point near the town of Isleta, in the county of Bernallillo, Territory of New Mexico, coterminous with the 14, 15, 16, 17 and 18 sections of said road, which said section of road and telegraph line has been duly accepted by the President of the United States, as provided in the aforesaid Acts of Congress.

C. H. FANCHER.

Subscribed and sworn to before me this twenty-seventh day of June, A. D. 1896.

(Seal) EARL A. SNYDER,
Notary Public.

We hereby certify that we have carefully and critically examined the foregoing list of the lands claimed by the Atlantic and Pacific Railroad Company, under the grant to said Atlantic and Pacific Railroad Company by the Acts of Congress, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Ocean, approved July 27th, 1866," and selected by C. H. Fancher, the duly authorized General Agent of the Land Department of the said Atlantic and Pacific Railroad Company; and we have tested the accuracy of said list by the plats and records in this office, and we find the same to be correct; and we further certify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the forty miles of Granted Limits on each side, and that the same are not nor is any part thereof returned and dominated as mineral lands or land, nor claimed as swamp land, neither are there any homesteads, pre-emptions, State, nor other valid claim to any portion of said lands on file or record in this office. We further certify that the foregoing list shows as assessment of the fees payable to us, allowed by the Act of Con-

gress, "Approved July 1st, 1864," and contemplated by the instructions dated January 24th, 1867, and addressed by the Commissioners of the General Land Office to the Registers and Receivers of United States Land Offices, and that the said Atlantic and Pacific Railroad Company has paid the undersigned, the Receiver, the full sum of one thousand, three hundred and forty ($1340) dollars, in full payment and discharge of said fees.

Register of the U. S. Land Office,
H. D. Ross,
Receiver of the U. S. Land Office,
JAKE MARKS.

Noted in Selection Docket page 10."

For the reason that the same was incompetent, irrelevant and immaterial and not the best evidence. That the purported correspondence attached to said "Exhibit B" and certified to by the Commissioner, could not be made competent evidence by virtue of the certificate of the Secretary of the Interior or any subordinate official. That which is incompetent evidence in the first instance and before the purported letters were certified to, cannot be made evidence by virtue of a certificate.

II.

That said District Court and said Supreme Court in affirming the same, erred in overruling

appellant's motion for a non-suit for the reason that it nowhere appears in the record by any competent testimony, that the land in question was not land excepted by the terms of the grant to the Atlantic & Pacific Railroad Company under the Act of Congress dated July 27th, 1866.

III.

The said District Court and the Supreme Court in affirming the same, erred in not holding that appellee's said cause of action was barred by limitation under and by virtue of Par. 2941, Revised Statutes Arizona 1901, for the reason that the complaint of the appellee was filed on the 13th day of July, 1898, and the appellant in his said answer alleged that he occupied and was in possession of and claimed the real property described in said appellee's complaint by right of possession only, and that he had had open, peaceable, adverse and continuous possession of said premises by right of possession only for a period of more than two years immediately prior to the bringing of said action, and for more than two years after appellee's right of action accrued, and that the same was fully barred by the statute of limitations; which said plea was abundantly sustained by the uncontradicted testimony in the case.

IV.

That the Court erred in denying and overruling defendant's motion for a new trial of said cause, for each and all of the reasons hereinabove assigned, and for the further reason that the judgment and decree of the Court is not supported or sustained by the evidence. That is to say:

1. It is nowhere found in the record established by any competent testimony that the appellee has any legal or equitable title to said land in question in that it is not shown by competent testimony that the land in question was not of lands excepted by the terms of the grant to the Atlantic & Pacific Railroad Company. The evidence discloses that no patent to said lands has been issued by the United States to the Atlantic & Pacific Railroad Company, and does not disclose by competent testimony in the record that the land in question was of the character called for by the Act of Congress of July 27th, 1866; nor that a selection of the same was made by the Railroad Company, nor that the selection of the same as made by said Atlantic & Pacific Railroad Company was approved by the Secretary of the Interior or the Commissioner of the General Land Office; nor that anything was done and performed in relation to said lands

which would bind the United States and which would make the issuance of a patent thereto follow as a mere ministerial act. That plaintiff and appellee has failed to connect his title with that of the United States or to show any title in himself.

V.

That said Supreme Court erred in deciding and holding that filtrating and percolating water oozing through the soil beneath the surface in undefined channels, has no characteristics of ownership distinct from the land itself and is not subject to appropriation by another but belongs to the owner of the soil, for the reason that since the common law rule that the owner of land was the absolute owner of percolating water beneath the surface of his land, could not be fully applied to the Territory of Arizona by reason of its peculiar physical conditions, such common law rule was not adopted in the Territory of Arizona as a part of the English common law, and waters percolating through the soil beneath the surface are subject to appropriation, and the appropriation of said waters upon the land in question by the appellant, although said waters be found to be percolating water, was a good and valid appropriation thereof in law.

For the purpose of discussion, the Assignment of Errors may be grouped under four heads as follows:

First: In the first Assignment of Error it is set forth that the trial court, and the Territorial Supreme Court in sustaining its holdings, erred in admitting in evidence the certified copy under seal of the General Land Office pertaining to the selection of lands by the Atlantic & Pacific Railroad Company (Rec. pp. 23-26 and 80-83.)

Second: In the second and fourth Assignments of Error it is set forth that the trial court, and the Territorial Supreme Court in sustaining its holding, erred in overruling Appellant's motion for a non-suit (Rec. p. 40) on the ground that all the evidence in the case did not disclose any title to the premises in question in the plaintiff. And in holding that the land in question was of the character of land granted by the Act of Congress of July 27th, 1866, to the Atlantic & Pacific Railroad Company. And in holding that plaintiff had shown sufficient title in himself to maintain said action.

Third: In the third Assignment of Error it is set forth that the trial court, and the Territorial Supreme Court in affirming the same, erred in not sustaining appellant's plea of the statute of

limitations (Rec. p. 3 and p. 79 fol. 147.)

Fourth: In the fifth Assignment of Error it is set forth that the Territorial Supreme Court erred in deciding and holding that filtrating or percolating water oozing through the soil beneath the surface in undefined channels has no characteristic of ownership distinct from the land itself and is not subject to appropriation by another but belongs to the owner of the soil. And in holding that appellant's appropriation of said water was not a good and lawful appropriation thereof in law.

Argument.

POINT I.

It is urged that the Court erred in admitting in evidence plaintiff's Exhibit "B." (Rec. 23-26.) The document purports to be certified copies of letters and correspondence with reference to the selection of certain lands by the Atlantic & Pacific Railroad Company, and the *ex parte* affidavit of C. H. Fancher to the effect that the lands in question are non-mineral and of the character contemplated by the grant.

This certified copy, if admissible at all, is made so by virtue of Section 891, Revised Statutes of the United States, which provides, "Copies of any records, books or papers in the General Land Office authenticated by the seal

and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof."

Under a somewhat similar section applicable to the records of the Postoffice department, it was held in *United States vs. Case et al.*, 49 Fed. Rep. 270: "If the original of a paper, book or account is evidence, a copy properly certified is equally admissable. It was not the intention of Congress to admit incompetent evidence under guise of a certificate."

U. S. vs. Jones, 8 Pet. 395.
U. S. vs. Forsythe, 6 McLean, 584.
U. S. vs. Buford, 3 Pet., 12
Hoyt vs. U. S., 10 How., 109
Bruce vs. U. S., 17 How., 437

It must be conceded that the original letters, correspondence and affidavit would not be competent evidence concerning the matters of which they purport to relate.

Under the stipulation read in evidence (Rec. p. 21-22,) it is admitted that the lands were regularly listed and selected, and the *filing thereof* was allowed and approved by the Register and Receiver of the local land office. However, the purported facts as set forth in said letters and statements were not admitted nor shown by any

evidence in the case other than by plaintiff's "Exhibit B," upon which appellee must entirely rely to establish the fact that the land in question is of the character of land granted to the Railroad Company. It will be noted that the bill of exceptions contains all of the evidence and all of the facts given in evidence upon the trial. (Rec. p. 64-65.)

POINT II.

It will be observed that no patent had been issued by the United States to the Atlantic & Pacific Railroad Company for the lands in question, (Rec. p. 78,) and therefore the burden was on the plaintiff to show not only that the land was within the general limits of the grant, but also that it was *not* a portion of lands excepted from the grant.

In the case of *Corinne Mill, Canal & Stock Company vs. Johnson*, 156 U. S. 574, the facts were almost identical with those of the case under consideration. Justice BREWER in delivering the opinion of the Court, says:

> "The grant to the railroad company was "not of all the odd-numbered sections within "twenty miles of its line of definite location, "but of these sections subject to certain excep- "tions. Proof that the road had been located "and completed, and that the tracts claimed

"were odd numbered sections within the "twenty-mile limit, was not sufficient to es- "tablish title in the company. The evidence "must go further, and the burden was upon "the plaintiff to show that they were not of "the lands excepted. *Maxwell Land Grant "Co. vs. Dawson*, 151 U. S. 586.

"Now, the defect in this record, which is "fatal to the case of the plaintiff in error, is "that nowhere is it shown that all the testi- "mony received on the trial is preserved. "Under such circumstances we are not at "liberty to assume that there was in evidence "a patent, or other instrument of itself work- "ing a transfer of the legal title from the Gov- "ernment to the railroad company, or evi- "dence of any character removing all doubt as "to the matter of exceptions, nor, on the "other hand that there was not testimony "which conclusively established the existence "of some one or more of these exceptions.

"Take for illustration the question whether "these were mineral lands. The grant in "terms excepted such lands from its operation. "There was no evidence of any adjudication "by the Land Department, either through the "issue of a patent or otherwise, that they were "non-mineral lands. *Barden vs. Northern "Pacific R. Co.*, 154 U. S. 288. While there "was on the part of the plaintiff some testi- "mony of a general character tending to show

"that the lands were grazing lands, and that
"no mineral had ever been discovered in them,
"yet, for ought that appears, there may have
"been overwhelming evidence that mines had
"in fact been opened and worked in them, or
"that there had been an express adjudication by
"the Land Department that they were min-
"eral lands and excepted from the grant.
"And so of other exceptions."

Appellee offered no testimony at the trial to show that the land in question was *not* lands excepted by the terms of the grant to the Atlantic & Pacific Railroad Company, other than such testimony as was presented by the introduction of his "Exhibit B," being the certified copy of the listing of said lands by the railroad company and the allowance of the filing thereof by the Register and Receiver and the statement of such Register and Receiver as to what the plats and records of their office disclosed. And appellee relies on this showing to establish his title upon which to maintain his action in ejectment.

Whether the Atlantic & Pacific Railroad Company was entitled to the land in question—that is, whether it was of the character of lands granted, is a question that can only be determined by the Land Department.

Steel vs. St. Louis Smelt. & Ref. Co.,
106 U. S. 450

Heath vs. Wallace, 138 U. S. 573

It in no way appears in the record that the Secretary of the Interior, or the Commissioner of the General Land Office, has ever approved the selection or decided that the lands were of the character granted, or come to any conclusion in regard to it.

The fact that the Railroad Company duly listed said lands and that the Register and Receiver allowed and approved the filing thereof, and certified the same to the Commissioner of the General Land Office, cannot give appellee equitable title.

Upon very similar facts this question is discussed in *Barden vs. Northern Pacific R. Co.*, 154 U. S. 288. In delivering the opinion of the Court, Justice FIELD at page 320, says:

> "Nor is there any force in the averments "that in November, 1868, the plaintiff listed "the sections embracing the mineral lands in "controversy, with other sections as portions "of its grant and filed the lists in the local land "office at Helena and paid the Receiver's fees "for filing the same; and that the Register and "Receiver accepted, allowed and approved "the list and certified the same to the Com- "missioner of the General Land Office, and "that no part of the fees have been refunded. "The Act of Congress does not provide that

"selections of the lands by the plaintiff as a "part of its grant shall in any respect change "its purport and effect and eliminate any of "its reservations; nor does it empower the of- "ficers of the local land office to accept the "list as conclusive with respect to such grant "in any particular."

The Land Department had power to adopt and did adopt rules and regulations for the administration of the local land office in the filing, accepting and certifying to the Commissioner of the General Land Office the lists of selection by said Railroad Company.

The Courts will take judicial notice of the rules and regulations made by that Department.

Caha vs. United States, 152 U. S. 211

The rules and regulations promulgated by the Land Department for the direction of Register and Receiver in the filing and certifying the selection made by the Atlantic & Pacific Railroad Company (as shown upon the face of plaintiff's "Exhibit B") are contained in a circular of instructions dated October 15th, 1873, in modification of instructions of January 24th, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of United States Land Offices, and approved by the Secre-

tary of the Interior, Sections 8th and 9th of which are as follows:

"8th. Herewith is a form of title-page to "be prefixed to the List of Selection.

"Let me here call your special attention to "the necessity of *great care* in the examination "and testing of these lists, so that all conflicts "may be avoided, and improper selections be "excluded, and that the verified schedules may "be absolutely accurate, thus avoiding em- "barrassment and delay to all concerned.

"9th. Pacific Railroad act, July 2, 1864.— "It is provided in section 4 that the word "'mineral,' when it occurs in that act, shall "not be held to include iron and coal. There- "fore, iron and coal lands are subject to se- "lection by the Pacific Railroads; but all other "minerals are expressly excluded from the "grant, and must necessarily be so from all "selections you may certify to this office. "When the verified lists are received at the "General Land Office, prepared and certified "as above required, such definitive action as "the law requires will be here taken, with the "view to invest the grantee with a complete "title.

"These instructions will supercede those of "May 30, 1866, Circular No. 9, and of Jan- "uary 24, 1867, Circular No. 15. The "forms attached hereto, which are made a "part hereof, will be followed in certifying to

"maps and lists, where the same may be ap-
"plicable.

"You will please acknowledge the receipt of
"this circular, giving the date of reception.

This question was directly before this Court in the case of *Cosmos Exploration Co. vs. Gray Eagle Oil Co.*, 190 U. S. 301, in which the Court gave construction to Section 18 of the Rules and Regulations promulgated by the Land Department for the purpose of carrying out the Act of June 4th, 1897, found in Land Dec. 589, 592, and which is as follows:

"18. All applications for change of entry
"or settlement must be forwarded by the local
"officers to the Commissioner of the General
"Land Office for consideration, together with
"report as to the status of the tract applied for.

Justice PECKHAM, in speaking for the court, says:

"The 'consideration,' mentioned in Rule 18,
"is clearly not of the character of a review of
"a decision already made by the local land of-
"ficers, but is in the nature of an original con-
"sideration of the subject by the General
"Land Office, to which office the final decision
"belongs. The *applications* are to be for-
"warded, not a decision by the local land
"office, together with a report (not a decision)
"as to the status of the land. This rule
"makes it the duty of the local land officers

"merely to forward the various applications to "the General Land Office, and an original "decision is to be made by the latter office "upon the papers transmitted to it. * * *

"But, as has already been stated, there is "nothing in the statute of 1897 which gives "the local land officers the right to decide "whether the selector has complied with the "provisions of the act, and unless those offi- "cers had that power they did not acquire it "by assuming to exercise it. We do not say "they did so assume. They received, ac- "cepted and filed the deed, the abstract of "title, the non-mineral affidavit, and the se- "lection as made by Clarke. They entered "that selection upon the official records of the "land office, and they certified that it was "free from conflict, and that there was no ad- "verse filing, entry, or claim thereto; but it "cannot be said that they decided that the se- "lector had complied with the provisions of "the statute, or that he had done all that he "ought to have done in order to acquire his "alleged complete, equitable title. * * * *

"In truth, all that these local officers did "was to certify that the selector had done cer- "tain things, and that the land selected was "vacant and open to settlement so far as it "appeared from the books of the local "land office.

"Taking into consideration, however, the "fact that the statute did not vest to local of-

"ficers with the right to decide upon the ques-
"tion of a compliance with its terms, and the
"further fact that the Land Department had
"adopted rule 18, above referred to, which
"provides for the forwarding of all applica-
"tions for change of entry or settlement to the
"Commissioner of the General Land Office
"for his consideration, together with a report
"as to the status of the tract applied for, we
"must conclude that the action of the local
"officers did not, as it could not, amount to a
"decision upon the application of the selector,
"so that he became vested with the equitable
"title to the land he assumed to select. It is
"certain, as we have already remarked, there
"must be some decision upon that question
"before any equitable title can be claimed—
"some decision by an officer authorized to
"make it. Under the rule above cited, that
"decision has not been made. The General
"Land Office has (so far as this record shows)
"come to no conclusion in regard to it. * * *

"Concluding, as we do, that the question
"whether the complainant has ever made a
"proper selection of land in lieu of the land
"relinquished, has never been decided by the
"Land Department, but is still properly be-
"fore that department, the courts cannot
"take jurisdiction and proceed to decide such
"questions themselves. The government has
"provided a special tribunal for the decision of
"such a question arising out of the adminis-

"tration of its public land laws, and that juris-
"diction cannot be taken away from it by the
"courts. *United States vs. Schurz*, 102 U.
"S. 378."

The facts in the case under consideration are indeed very much stronger than those in the case of Cosmos Exploration Co. vs. Gray Eagle Oil Co. in that the language of Section 18 of rules and regulations under Act of June 4th, 1897, was such as required construction, while the language of Section 9th, of the circular of instructions of October 15th, 1873, is such as to require no interpretation. The language: "When the verified lists are received at the General Land Office prepared and certified as above required, such definite action as the law requires will be *here* taken with the view to invest the grantee with a complete title," is certainly such as to preclude any further discussion upon this subject.

For the convenience of the Court the appellant has caused to be filed herewith a certified copy of the Circular of Instructions of October 15th, 1873, in modification of the instructions of January 24th, 1867, above referred to.

Point III.

The defendant and appellant herein pleaded the Statute of Limitations in the third defense

of his amended answer in the following language: "That the defendant now holds and has held and occupied by right of possession only for more than two years immediately prior to the commencement of this action, the land and premises described in plaintiff's said complaint." (Rec. p. 3.)

This allegation was fully sustained by the evidence as is shown by the findings of fact of the Territorial Supreme Court (Rec. p. 79.)

This plea should have been sustained under Section 2941, Revised Statutes of Arizona, 1901, the same being a literal re-enactment of paragraph 2301 Revised Statutes of Arizona 1887, and which reads as follows:

> "2941 (Sec. 7.) In all cases when the "party in possession claims real property by "right of possession only suits to recover the "possession from him shall be brought in two "years after the right of action accrues, and "not afterwards, and in such case the defend- "ant is not required to show title or color of "title from and under the sovereignty of the "soil as provided in the preceding section as "against the plaintiff, who shows no better "right."

Touching this question, Justice DOAN, speaking for the Territorial Supreme Court, says:

> "The occupancy of the land by the defend-

"ant based upon the right of possession only "does not avail against the plaintiff herein "claiming under a valid record title. Par. "2222, Revised Statutes of 1887, (afterward "amended by act No. 79 of the laws of 1893 "and incorporated in the Revised Statutes of "1901 as par. 3525) under which the defend- "ant claimed to hold this land as a possessory "right, by way of establishing what was "therein called 'possessory rights,' provided:

" 'That all persons who have heretofore or "may hereafter settle upon, cultivate or im- "prove a tract of land in this Territory, with "the view of acquiring title thereto, under "existing laws of the United States, shall be "protected in the peaceable possession and "quiet enjoyment of said tract of land, with "all the improvements thereon, and all the "wood, timber, soil and materials growing or "being thereon, to the extent of one hundred "and sixty acres or one half mile square in "compact form, if unsurveyed, according to "the cardinal points, and, if surveyed by the "United States, then according to the lines of "said survey, so as to include such improve "ments.' "

"This law gave to settlers the right to hold "solely by possession land to the extent of one "extent of one hundred and sixty acres, and "provided for their protection in such peace- "able possession, the only two requisites being

"that the land thus held should be unoccupied "Government land belonging to the United "States, and that the settler should occupy "and hold the same with the view of acquir- "ing title thereto, under the existing land laws "of the United States. The statute of limita- "tions invoked by the defendant in this in- "stance was evidently intended by the legis- "lature to apply to such persons and would be "available to bar an action between contesting "parties of this class wherein neither party "could claim title to the premises, but each "claim only the subordinate right to possession "subject to the recognized paramount title of "the United States."

However, it is the contention of appellant that there is nothing in the record to show that plaintiff was "claiming under a valid record title" but that the record shows that his claim was based upon a purported deed from the Atlantic & Pacific Railroad Company which was unrecorded (Rec. 33-40.) And further, the record does not disclose the fact that appellant and his grantor ever claimed to hold said land under paragraph 2222 Revised Statutes of Arizona 1901, but the answer of appellant (Rec. p. 3) and the findings of fact by the Territorial Supreme Court show as follows: (Rec. p. 79.)

"That said appellant and his grantor as "aforesaid have been in the exclusive, open

"and notorious possession, with the knowledge "of appellee, of said land, improvements and "water ever since the year 1889, claiming by "right of possession only, and have used the "water on said land for watering of stock "thereon."

While the effect of this statute is indeed peculiar, the language is plain, and free from ambiguity. The words "suits to recover possession" have a known legal meaning and it must be assumed that the expression is used in its legal sense.

As is said in *Hamilton vs. Rathbone*, 175 U. S. 421, by Justice BROWN: "Indeed the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is unnecessary."

Upon this question the true rule was announced in *Gardner vs. Collins*, 2 Pet. 93, by Justice STORY, as follows:

"What the legislative intention was can be "derived only from the words they have used, "and we cannot speculate beyond the reason- "able import of these words; the spirit of the "act must be extracted from the words of the "act, and not from conjectures *aliunde*."

It was certainly within the power of the legis-

lature to so legislate, and that seems to be an end of the question.

Point IV.

The Territorial Supreme Court in its opinion, speaking through Justice DOAN, says: (Rec. p. 71-72.)

> "The determination of this case depends "upon whether the water developed and used "by Cross plaintiff, and claimed to have been "appropriated by him, constituted a stream "flowing in natural channels between well de- "fined banks, such as is contemplated by the "provisions of our statutes as cited herein, and "therefore the subject of appropriation, or "whether it was on the contrary filtrating or "percolating water oozing through the soil be- "neath the surface in undefined and unknown "channels, and therefore a component part of "the earth having no characteristic of owner- "ship distinct from the land itself, and there- "fore not subject to appropriation by another, "but belonging to the owner of the soil.
>
> "Throughout the Pacific Coast where the "doctrine of appropriations obtains the deci- "sions are uniform to the effect that waters "percolating generally through the soil be- "neath the surface are the property of the "owner of the soil."

In thus applying the literal common law doctrine to the physical conditions as they exist in

the arid Territory of Arizona, it may be presumed that the Court failed to consider the extent to which the common law is adopted by the Statutes of Arizona.

It is provided by paragraph 2935 Revised Statutes of Arizona 1887 as follows:

> "2935. The common law of England so "far only as it is consistent with and adapted "to the natural and physical conditions of this "territory, and the necessities of the people "thereof, and not repugnant to, or inconsistent "with the Constitution of the United States, "or bill of rights, or laws of this territory, or "established customs of the people of this "territory, is hereby adopted and shall be the "rule of decision in all courts of this territory."

However, the above statute as set forth in paragraph 2935 Revised Statutes of Arizona 1887, was entirely omitted from and repealed by the revision of the Statutes of Arizona September 1st, 1901. And thereafter the common law of England was not the rule of decision in Arizona. This repeal is contained in paragraph 4234 Revised Statutes of Arizona 1901, and is as follows:

> "4234 (Section 1.) All statutes, laws and "titles of the Revised Statutes of Arizona "1887 are hereby repealed, except Title III, "Assignments for benefit of Creditors."

This identical question was recently before the

Supreme Court of California in the case of *Katz et al. vs. Walkinshaw*, 141 Cal. 116; 74 Pac. R. 766, in which that Court in a very exhaustive opinion laid down the doctrine that since the common law rule that an owner of land was the absolute owner of percolating waters beneath the surface of his land could not be equitably applied to the State of California by reason of its peculiar physical conditions, such rule was not adopted in such State as a part of the English common law.

The natural and physical conditions of the Territory of Arizona, and the necessities of its people being distinctly and in every particular similar to those of California, of which the Court will undoubtedly take judicial notice, it follows that the reasoning of the Court in the case of *Katz vs. Walkinshaw* may be applied with almost binding force to the facts of the case at bar.

In delivering the opinion of the Court, Justice SHAW in part says:

> "Whenever it is found that, owing to the "physical peculiarities of its climate, soil and "productions, the application of a given com- "mon-law rule by our courts tends constantly "to cause injustice and wrong, rather than the "administration of justice and right, then the "fundamental principles of right and justice

"on which that law is founded, and which its "administration is intended to promote, re- "quires that a different rule should be adopted; "one which is calculated to secure persons in "their property and possessions, and to pre- "serve for them the fruits of their labors and "expenditures. The question whether or not "the rule contended for is a part of the com- "mon law applicable to this state depends on "whether it is suitable to our conditions under "the rule just stated.

"It is necessary, therefore, to state the con- "ditions existing in many parts of this state, "which are different from those existing where "the rule had its origin. In a large part of "the state, and in almost all of the southern "half of it, particularly south of the Tehachapi "range of mountains, aside from grains, "grasses, and some scant pasturage, there is "practically no production by agriculture ex- "cept by means of artificial irrigation. In a "few places favored by nature crops are nour- "ished by natural irrigation, due to the exist- "ence underneath the ordinary soil of a satu- "rated layer of sand or gravel; but these "places are so few that they are of no conse- "quence in any general view of the situation. "Irrigation in these regions has always been "customary, and under the Spanish and Mex- "ican government it was fostered and encour- "aged. Even in the earlier periods of the

"settlement of the country after its acquisition
"by the United States, and while the popula-
"tion was sparse and scattered compared to
"the present time, the natural supply of water
"from the surface streams, as diverted and
"applied by the crude and wasteful methods
"of diversion, distribution, and application
"were adopted, and the streams were made to
"irrigate a very much larger area of land.
"While this process was going on, a series of
"wet years augmented the streams, and still
"more land was put under the irrigating sys-
"tems. Recently there has followed another
"series of very dry years, which has corre-
"spondingly diminished the flow of the streams.
"After this period began, it was soon found
"that the natural streams were insufficient.
"The situation became critical, and heavy loss
"and destruction from drought was imminent.
"Still the population continued to increase,
"and with it the demand for more water to
"irrigate more land. Recourse was then had
"to the underground waters. Tunnels were
"constructed, more artesian wells bored, and
"finally pumps driven by electric or steam
"power were put into general use to obtain
"sufficient water to keep alive and productive
"the valuable orchards planted at the time
"when water was supposed to be more abun-
"dant. The geological history and formation
"of the country is peculiar. Deep borings

''have shown that almost all of the valleys and
''other places where water is found abundant-
''ly in percolation were formerly deep canyons
''or basins, at the bottoms of which anciently
''there were surface streams or lakes. Gravel,
''boulders, and occasionally, pieces of drift-
''wood have been found near the coast far
''below tide level, showing that these sunken
''stream beds were once high enough to dis-
''charge water by gravity into the sea. These
''valleys and basins are bordered by high
''mountains, upon which there falls the more
''abundant rain. The deep canyons or basins
''in course of ages have become filled with the
''washings from the mountains, largely com-
''posed of sand and gravel, and into this por-
''ous material the water now running down
''from the mountains rapidly sinks, and slowly
''moves through the lands by the process
''usually termed 'percolation,' forming what
''are practically underground reservoirs. It is
''the water thus held or stored that is now
''being taken to eke out the supply from the
''natural streams. In almost every instance
''of a water supply from the so-called perco-
''lating water, the location of the well or
''tunnel by which it is collected is in one of
''these ancient canyons or lake basins. * * *

''It is scarcely necessary to state the condi-
''tions existing in other countries referred to
''to show that they are vastly different from

"those above stated. There the rainfall is "abundant, and water, instead of being of "almost priceless value, is a substance that "in many instances is to be gotten rid of "rather than preserved. * * *

"It may, indeed, become necessary to make "new applications of old principles to the new "conditions; and, in view of the novelty of the "doctrine, and the scope of argument, it is "not out of place to indicate to some extent "how it should be done, although otherwise it "would not be necessary to the decision of the "case. The controversies arising will natur- "ally divide into classes. There will be dis- "putes between persons or corporations claim- "ing rights to take such waters from the same "strata or source for use on distant lands. "There is no statute on this subject, as there "now is concerning appropriations of surface "streams; but the case is not without prece- "dent. When the pioneers of 1849 reached "this state, they found no laws in force gov- "erning rights to take waters from surface "streams for use on nonriparian lands. Yet it "was found that the principles of the common "law, although not previously applied to such "cases, could be adapted thereto, and were "sufficient to define and protect such rights "under the new conditions. The same condi- "tion existed with respect to rights to mine on "public land, and a similar solution was found.

"The principles which, before the adoption of "the Civil Code, were applied to protect ap- "propriations and possessory rights in visible "streams, will, in general, be found applicable "to such appropriations of percolating waters, "either for public or private use, and will suf- "fice for their protection as against other ap- "propriators. Such rights are usufructuary "only, and the first taker who with diligence "puts the water in use will have the better "right. And in ordinary cases of this charac- "ter the law of prescriptive titles and rights "and the statute of limitations will apply."

In all litigation arising in the Territory of Arizona, regardless of the question involved, where the amount in controversy exceeds the sum of five thousand dollars, this Court is the Court of last resort, and it will, therefore, probably not be contended that the decision of the Supreme Court of Arizona in the case under consideration is binding upon this Court, especially so inasmuch as legislature in the first instance only adopted the common law in so far as the same was adapted to the natural and physical conditions of the territory—and afterwards in 1901 abrogated it entirely.

The judgment of the Supreme Court of Arizona affirming the judgment of the trial court

should be reversed, and the cause remanded with directions to enter a judgment in favor of defendant with costs.

Respectfully submitted,

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